TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted].

No. [redacted].29

THE CLEMENT NATIONAL BANK, PLAINTIFF IN ERROR,

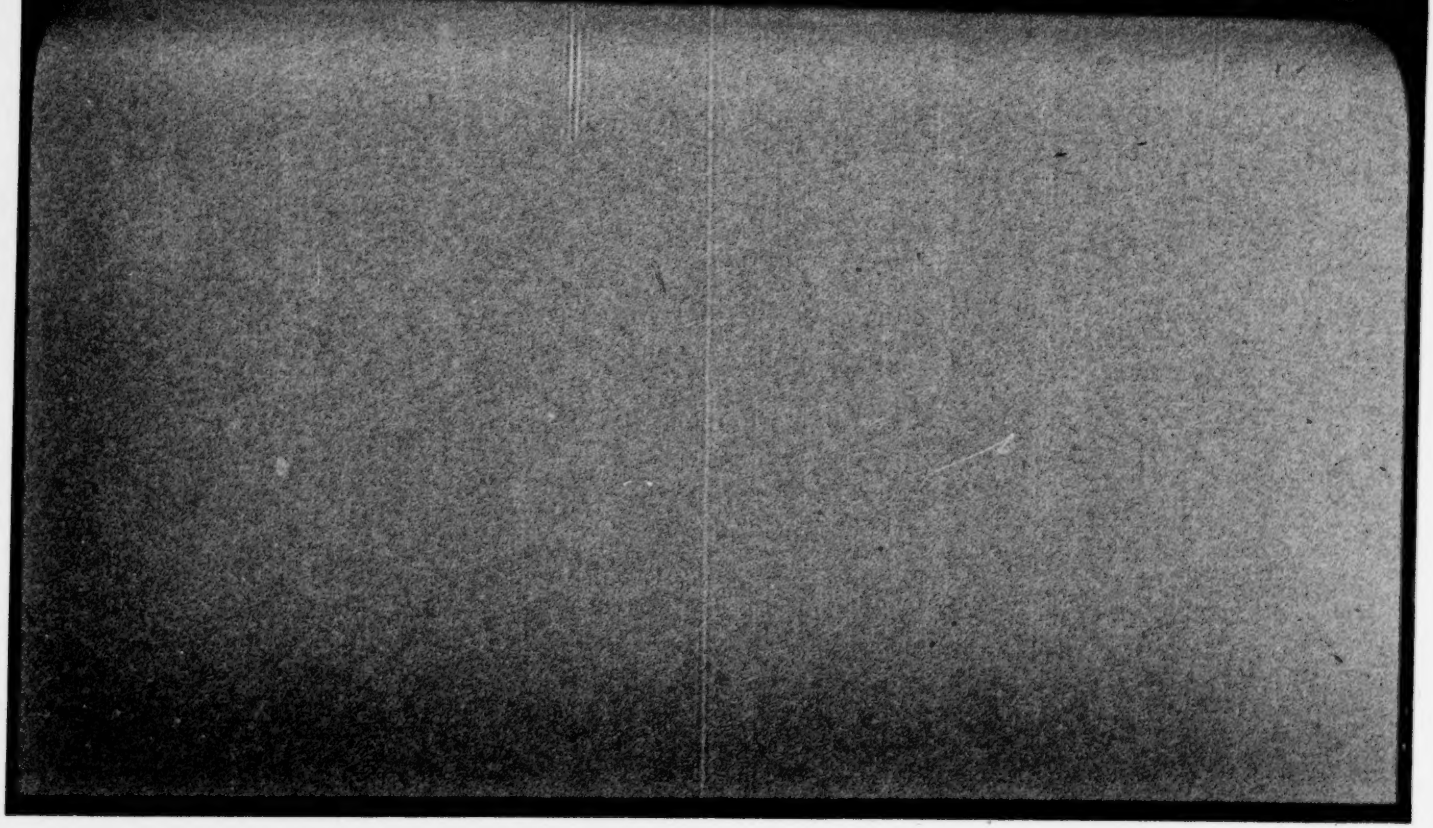
vs.

THE STATE OF VERMONT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

FILED APRIL 10, 1911.

(22,615)



(22,615)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 567.

THE CLEMENT NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

THE STATE OF VERMONT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

INDEX.

	Original.	Print
Caption	1	1
Record from Rutland county court	4	2
Acceptance of service of writ, &c	4	2
Declaration—Count one	6	3
Count two	10	5
Count three	13	6
Common counts	17	8
Defendant's appearance	18	8
Defendant's plea	18	8
Declaration—First additional count	18	8
Second additional count	23	10
Third additional count	26	12
Agreed statement of facts	29	14
Findings	37	18
Judgment	38	19
Defendant excepts	38	19
Cause passed to supreme court	38	19

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 23, 1912.

	Original	Print
Exhibit A—Stipulation	39	20
B—Certificate	40	21
C—Form of statement	41	21
D—Deposit book	44	23
E—Form of certificate of deposit	47	25
F—Form of certificate of deposit	48	26
Defendant's bill of exceptions	49	26
Argument in supreme court	52	28
Additional statement of facts	53	29
Judgment of supreme court	53	29
Opinion of supreme court	55	29
Petition for writ of error	101	49
Order allowing writ of error	104	50
Supersedeas bond	106	50
Assignment of errors	108	51
Return to writ of error and clerk's certificate	130	62
Writ of error	131	62
Citation and acceptance of service	134	63

1 STATE OF VERMONT,
Rutland County, ss:

Pleas before the Honorable the Supreme Court, at a General Term Thereof Begun and Held for the County of Rutland, at Montpelier, in the County of Washington, on the First Tuesday of January, Being the Third Day of January, in the Year of Our Lord One Thousand Nine Hundred and Eleven and of the Independence of the United States the One Hundred and Thirty-fifth.

Present:

The Hon. John W. Rowell, Chief Judge.
The Hon. Loveland Munson,
The Hon. John H. Watson,
The Hon. Seneca Haselton,
The Hon. George M. Powers,
Associate Judges.

Officers of the Court:

Melville E. Smilie, Clerk of the General Term.
Henry A. Harman, Clerk of the Supreme Court for the County of Rutland.

On which day said Court was opened and continued its sessions from day to day, for the disposition of causes, until the 13th day of January, A. D. 1911, when the same was adjourned without day.

Attest, H. A. HARMAN, *Clerk.*

2 STATE OF VERMONT:

Supreme Court, Rutland County, January Term, 1911.

Docket No. 6776.

STATE OF VERMONT
v.
CLEMENT NATIONAL BANK.

Be it remembered that, on this 12th day of May, A. D. 1910, comes the Clement National Bank, a National Banking Association, organized and existing under and by virtue of the laws of the United States having its principal office and place of business at the city of Rutland, in the County of Rutland, in the State of Vermont, by O. M. Barber and M. C. Webber, its attorneys, and files with the clerk for the county of Rutland of the Supreme Court of the State of Vermont, in his office at the city of Rutland, in said County,

a certain bill of exceptions to a decision and final judgment of the county court, within and for said county of Rutland, rendered at a term thereof, begun and held at the city of Rutland, in said
3 county, on the first Wednesday after the first Tuesday in March 1910, in a certain cause therein pending, wherein the State of Vermont is plaintiff and the said Clement National Bank is defendant.

Which said bill of exceptions and the record of the said judgment of said county court, and certain exhibits attached to the statement of facts in said cause, filed in said county court, upon which statement and the pleadings in said cause, said judgment was based, all follow in these words, to wit:

4 STATE OF VERMONT:

Rutland County Court, March Term, 1910.

Docket No. 6776.

STATE OF VERMONT
v.
CLEMENT NATIONAL BANK.

Be it remembered that, at the city of Rutland, in said county of Rutland, on this 29th day of December, A. D. 1909, comes the State of Vermont by Clarke C. Fitts, its attorney, and brings into the county court, within and for said county of Rutland, its writ of summons and attachment in due form of law, dated the 17th day of September, 1909, against the Clement National Bank, a National banking corporation, organized and doing business under the laws of the United States, at the city of Rutland aforesaid, and thereupon causes said writ to be entered and docketed by the clerk of this court; upon which writ an acceptance of service follows in these words, to wit:

"Service of the within writ is hereby accepted as of the 20th day of September 1909, and it is agreed that the same may be entered upon the Docket of the Rutland County Court as of said day
5 and be treated as pending therein and ripe for trial at the September Term 1909, of said Court.

It is further stipulated and agreed that if trial cannot be had in the Rutland County Court in said last named term, that said cause may be transferred by either party to the County Court within and for any convenient County in the State of Vermont, the same to be there tried and heard at the Term to which so transferred as if originally brought thereto and entered therein; and the defendant may file such plea or pleas as it may desire for hearing or trial in any County Court.

It being mutually desired by the parties to this suit to procure a determination thereof as speedily as may be in the Supreme Court of the State of Vermont, either party may, after the judgment of the County Court in which this suit shall be heard, cause the same

to be passed to the Supreme Court immediately and in such event the Bill of Exceptions shall be made and allowed and the cause stand for hearing on this stipulation at the earliest Term of the Supreme Court thereafter or then sitting, without reference to any rule or rules of court as to the time when such Bill of Exceptions shall be settled and allowed and the cause passed to the Supreme Court and noticed for trial therein.

6 Any further stipulation that may be necessary to place such cause on the trial Calendar of the Supreme Court in accordance with the intent of this stipulation, shall be made by either party hereto.

CLEMENT NATIONAL BANK,
By O. M. BARBER, *Its Attorney.*

By which writ and the said acceptance of service thereon, the defendant is duly summoned to appear before this court in the manner aforesaid, then and there to answer unto said plaintiff.

In a plea of the case, for that the defendant was on October 1, 1908, ever since has been and is a national bank, having its principal place of business in and doing business at Rutland, in said County of Rutland; that on October 1, 1908, and from thence forward each day to and including March 31, 1909, there was on deposit in said bank, by persons and corporations other than municipalities, corporations organized solely for charitable, educational or religious purposes, railroad, insurance, guaranty, express, telephone, telegraph, steamboat, car, transportation, sleeping car, parlor car, mortgage, loan or investment companies, savings banks, trust companies, savings bank and trust companies, national banks, deposits

7 on which said bank paid or allowed interest exceeding the rate of two per cent per annum, and that the average amount of such deposits in said bank during such period was Five hundred and seventy eight thousand six hundred and sixty nine dollars ($578,669);

That on September 20, 1908, in consideration that no depositor owning any such deposit should be required to make returns to the state treasurer of the State of Vermont and the commissioner of state taxes of the state of Vermont, showing the amount of his, the depositor's, such deposit, and that no such depositor should be required to pay to the state treasurer of the state of Vermont, the tax imposed by law on such deposit, to wit, seven twentieths of one per cent thereof for the semi-annual period beginning October 1, 1908, and ending March 31, 1909, the said bank filed with the commissioner of state taxes of the state of Vermont, a stipulation duly signed by said bank by C. H. Harrison, its cashier, who was thereto and therefor duly authorized by the board of directors of said bank, which stipulation is in the words and figures following:

"STATE OF VERMONT:

The Clement National Bank whose banking house is located at Rutland in the State of Vermont for the consideration hereinafter

named, hereby stipulates and agrees with the State of Vermont that on or before the thirtieth day of April 1909, it will make
8 sworn returns to the State Treasurer and Commissioner of State Taxes showing the average amount of all deposits held by it during the six months beginning with the first day of October 1908, whereon the rate of interest paid or allowed by said bank to the depositors thereof exceeds two per cent per annum; and that on or before the thirtieth day of April 1909, it will pay to the State Treasurer a tax of seven twentieths of one per cent of the average amount of all such deposits so held by it.

This stipulation is made and is to be filed with said Commissioner in consideration and for the purpose of carrying out the provisions of the statutes of Vermont which provide that upon the making and filing hereof as aforesaid no depositor having an interest bearing deposit or deposits in said bank whereon the rate of interest paid or allowed by said bank exceeds two per cent per annum shall be required on or before the twentieth day of October 1908, to make returns to the State Treasurer and Commissioner of State Taxes showing the amount of such deposit or deposits in said bank on the first day of October 1908, and that no such depositor shall be required to pay to the State Treasurer on or before the thirtieth day of November 1908, a tax of seven twentieths of one per cent of the amount of such interest bearing deposit or deposits so held by said bank on the first day of October 1908.

9 This stipulation is also made and is to be filed as aforesaid, for the purpose of obtaining from said Commissioner as the law provides a certificate in duplicate setting forth that the same has been filed and of showing that said bank has elected to pay and will pay to the State Treasurer on or before the thirtieth day of April 1909, a tax of seven twentieths of one per cent of the average amount of all such deposits held by said bank during the six months beginning with the first day of October 1908 on account of which the depositors thereof shall be by said bank paid or allowed interest exceeding the rate of two per cent per annum.

In witness whereof, said bank has on this 30th day of September 1908, at Rutland in the State of Vermont caused its corporate name to be hereunto affixed by its cashier duly empowered so to do by vote of said bank.

CLEMENT NATIONAL BANK.
Rutland, Vermont.
By C. H. HARRISON, *Cashier.*"

Whereby the said bank became liable to and promised to pay to the state of Vermont the amount of the tax imposed by law upon the depositors to whom such deposits belonged, to wit, the sum of seven twentieths (7/20) of one per cent of said average amount of such deposits, which tax amounted to the sum of Two Thou-
10 sand twenty five dollars and thirty three cents ($2,025.33) and which said sum of Two Thousand twenty five dollars and thirty three cents the said bank, to wit, at said Rutland, to wit, on the first day of June, 1909, faithfully promised the state of Vermont

to pay to it, the said state of Vermont; yet, though often requested, the said bank has not paid the same but neglects and refuses so to do.

Also in a further plea of the case for that the defendant was on October 1, 1908, ever since has been and is a national bank, having its principal place of business in and doing business at Rutland, in said County of Rutland; that on October 1, 1908, and from thence forward each day to and including March 31, 1909, there was on deposit in said bank, by persons and corporations other than municipalities, corporations organized solely for charitable, educational or religious purposes, railroad, insurance, guaranty, express, telephone, telegraph, steamboat, car transportation, sleeping car, parlor car, mortgage, loan or investment companies, savings banks, trust companies, savings bank and trust companies, national banks, deposits on which said bank paid or allowed interest exceeding the rate of two per cent per annum, and that the average amount of such deposit in said bank during such period was Five hundred and seventy eight thousand six hundred and sixty-nine dollars ($578,669);

11 That on September 20, 1908, for the consideration therein expressed, the said bank filed with the commissioner of state taxes of the state of Vermont and delivered to the state of Vermont, a stipulation duly signed by said bank by C. H. Harrison, its cashier who was thereto and therefor duly authorized by the board of directors of said bank, which stipulation is in the words and figures following:

"STATE OF VERMONT:

The Clement National Bank whose banking house is located at Rutland in the State of Vermont for the consideration hereinafter named, hereby stipulates and agrees with the State of Vermont that on or before the thirtieth day of April 1909, it will make sworn returns to the State Treasurer and Commissioner of State Taxes showing the average amount of all deposits held by it during the six months beginning with the first day of October 1908, whereon the rate of interest paid or allowed by said bank to the depositors thereof exceeds two per cent per annum; and that on or before the thirtieth day of April 1909, it will pay to the State Treasurer a tax of seven twentieths of one per cent of the average amount of all such deposits so held by it.

12 This stipulation is made and is to be filed with said Commissioner in consideration and for the purpose of carrying out the provisions of the statutes of Vermont which provide that upon the making and filing hereof as aforesaid no depositor having an interest bearing deposit or deposits in said bank whereon the rate of interest paid or allowed by said bank exceeds two per cent per annum shall be required on or before the 20th day of October 1908 to make returns to the State Treasurer and Commissioner of State Taxes showing the amount of such deposit or deposits in said bank on the first day of October 1908; and that no such depositor shall be required to pay to the State Treasurer on or before the thirtieth day of November 1908 a tax of seven twentieths of one per

cent of the amount of such interest bearing deposit or deposits so held by said bank on the first day of October 1908.

This stipulation is also made and is to be filed as aforesaid for the purpose of obtaining from said Commissioner as the law provides a certificate in duplicate setting forth that the same has been filed and of showing that said bank has elected to pay and will pay to the State Treasurer on or before the thirtieth day of April 1909, a tax of seven twentieths of one per cent of the average amount of all such deposits held by said bank during the six months beginning with the first day of October 1908 on account of which the depositors thereof shall be by said bank paid or allowed interest exceeding the rate of two per cent per annum:

13 In witness whereof, said bank has on this 30th day of September 1908 at Rutland in the State of Vermont caused its corporate name to be hereunto affixed by its cashier duly empowered so to do by vote of said bank.

CLEMENT NATIONAL BANK.
Rutland, Vermont.
By C. H. HARRISON, *Cashier.*"

Whereby the said bank became liable to and promised to pay to the state of Vermont the amount of the tax imposed by law upon the depositors to whom such deposits belonged, to wit, the sum of seven twentieths (7/20) of one per cent of said average amount of such deposits, which tax amounted to the sum of Two Thousand twenty five dollars and thirty three cents ($2,025.33) and which said sum of Two thousand twenty five dollars and thirty three cents the said bank to wit, at said Rutland, to wit, on the first day of June, 1909, faithfully promised the state of Vermont to pay to it, the said state of Vermont; yet, though often requested, the said bank has not paid the same, but neglects and refuses so to do.

Also in a further plea of the case for that the defendant was on October 1, 1908, ever since has been and is a national bank, having its principal place of business in and doing business at Rutland, in said County of Rutland; that on October 1, 1908, and from

14 thence forward each day to and including March 31, 1909, there was on deposit in said bank, by persons and corporations other than municipalities, corporations organized solely for charitable, educational or religious purposes, railroad, insurance, guaranty, express, telephone, telegraph, steam boat, car, transportation, sleeping car, parlor car, mortgage, loan or investment companies, savings banks, trust companies, savings bank and trust companies, national banks, deposits on which said bank paid or allowed interest exceeding the rate of two per cent per annum, and that the average amount of such deposits in said bank during such period, was, to wit.—One Million Dollars ($1,000,000);

That on September 20, 1908, in consideration that no depositor owning any such deposit should be required to make returns to the state treasurer of the state of Vermont and the commissioner of state taxes of the state of Vermont, showing the amount of his, the depositor's such deposit, and that no such depositor should be required to pay to the state treasurer of the state of Vermont the tax

imposed by law on such deposit, to wit, seven twentieths of one per cent thereof for the semi-annual period beginning October 1, 1908, and ending March 31, 1909, the said bank filed with the commissioner of state taxes of the state of Vermont, a stipulation duly signed by said bank by C. H. Harrison, its cashier, who was thereto
15 and therefor duly authorized by the board of directors of said bank, which stipulation is in the words and figures following:

"STATE OF VERMONT:

The Clement National Bank whose banking house is located at Rutland in the State of Vermont for the consideration hereinafter named, hereby stipulates and agrees with the State of Vermont that on or before the thirtieth day of April 1909, it will make sworn returns to the State Treasurer and Commissioner of State Taxes showing the average amount of all deposits held by it during the six months beginning with the first day of October 1908, whereon the rate of interest paid or allowed by said bank to the depositors thereof exceeds two per cent per annum; and that on or before the thirtieth day of April 1909, it will pay to the state treasurer a tax of seven twentieths of one per cent of the average amount of all such deposits so held by it.

This stipulation is made and is to be filed with said Commissioner in consideration and for the purpose of carrying out the provisions of the statutes of Vermont which provide that upon the making and filing hereof as aforesaid no depositor having an interest bearing deposit or deposits in said bank whereon the rate of interest paid or allowed by said bank exceeds two per cent per annum shall be
16 required on or before the twentieth day of October 1908, to make returns to the State Treasurer and Commissioner of State Taxes showing the amount of such deposit or deposits in said bank on the first day of October 1908; and that no such depositor shall be required to pay to the State Treasurer on or before the thirtieth day of November, 1908, a tax of seven twentieths of one per cent of the amount of such interest bearing deposit or deposits so held by said bank on the first day of October 1908.

This stipulation is also made and is to be filed as aforesaid, for the purpose of obtaining from said Commissioner as the law provides a certificate in duplicate setting forth that the same has been filed and of showing that said bank has elected to pay and will pay to the State Treasurer on or before the thirtieth day of April 1909, a tax of seven twentieths of one per cent of the average amount of all such deposits held by said bank during the six months beginning with the first day of October 1908, on account of which the depositor thereof shall be by said bank paid or allowed interest exceeding the rate of two per cent per annum.

In witness whereof, said bank has on this 30th day of September 1908, at Rutland in the State of Vermont caused its corporate name to be hereunto affixed by its cashier duly empowered so to do by vote of said bank.
17

CLEMENT NATIONAL BANK.
Rutland, Vermont,
By C. H. HARRISON, *Cashier.*"

That thereupon, to wit, on said 30th day of September 1908, the Commissioner of State Taxes issued in duplicate to said defendant a certificate showing that it had filed such stipulation.

Whereby the said bank became liable to and promised to pay to the state of Vermont the amount of the tax imposed by law upon the depositors to whom such deposits belonged, to wit, the sum of seven twentieths (7/20) of one per cent of said average amount of such deposits, which tax amounted to the sum of Three Thousand Five Hundred Dollars ($3,500), and which said sum of Three Thousand Five Hundred Dollars the said bank, to wit, at said Rutland, to wit, on the first day of June, faithfully promised the state of Vermont to pay to it, the said state of Vermont; yet, though often requested the said bank has not paid the same, but neglects and refuses so to do.

Also, in a plea of the case, in General Assumpsit, claiming in damages the sum of four thousand dollars, as by the plaintiff's declaration on file more fully appears.

18 And now, in the term of this court begun and held at the city of Rutland aforesaid, on the first Wednesday after the first Tuesday in September 1909, the said defendant appears also by Orion M. Barber, its attorney; and time is given, pursuant to the rules of this court, within which said defendant may answer said declaration; and day thereof is given, until the next regular term of this court, begun and held at the city of Rutland, in said county, on the first Wednesday after the first Tuesday in March 1910.

And now, within the time given as aforesaid, again comes the said defendant by its said attorney, and defends the wrong, and injury when, etc., and for plea says that it did not assume and promise in manner and form as the said plaintiff in its declaration has alleged; and of this it puts itself upon the country; and the said plaintiff does the like.

And now, in the March term of this court last aforesaid, again come the said parties by their said respective attorneys, and again put themselves upon the country, etc.; and on the 22d day of April, 1910, the said plaintiff files in this court by consent of parties an additional count to its said declaration, which follows in these words, to wit:

And now comes the said plaintiff, and, by leave of court for that purpose first had and obtained, makes and files an additional count to its declaration, to wit:

19 Also in a further plea of the case for that the defendant was on April 1, 1909, ever since has been and is a national bank, having its principal place of business in and doing business at Rutland, in said County of Rutland; that on April 1, 1909, and from thence forward each day to and including September 30, 1909, there was on deposit in said bank, by persons and corporations other than municipalities, corporations organized solely for charitable, educational or religious purposes, railroad, insurance, guaranty, express, telephone, telegraph, steam boat, car, transportation, sleeping car, parlor car, mortgage, loan or investment companies, savings banks, trust companies, savings bank and trust com-

panies, national banks, deposits on which said bank paid or allowed interest exceeding the rate of two per cent per annum, and that the average amount of such deposits in said bank during such period was Six Hundred and Fifty-six Thousand and Eight Hundred and Sixty-five dollars ($656,865.);

That on April 1, 1909, in consideration that no depositor owning any such deposit should be required to make returns to the state treasurer of the state of Vermont and the commissioner of state taxes of the state of Vermont, showing the amount of his, the depositor's such deposit, and that no such depositor should be required to pay to the state treasurer of the state of Vermont the tax imposed by law on such deposit, to wit, seven twentieths of one per cent thereof
20 for the semi-annual period beginning April 1, 1909, and ending September 30, 1909, the said bank filed with the commissioner of state taxes of the State of Vermont, a stipulation duly signed by said bank by C. H. Harrison, its cashier, who was thereto and therefor duly authorized by the board of directors of said bank, which stipulation is in the words and figures following:

"STATE OF VERMONT:

The Clement National Bank whose banking house is located at Rutland in the State of Vermont for the consideration hereinafter named, hereby stipulates and agrees with the State of Vermont that on or before the thirty-first day of October 1909, it will make sworn returns to the state Treasurer and Commissioner of State Taxes showing the average amount of all deposits held by it during the six months beginning with the first day of April 1909, whereon the rate of interest paid or allowed by said bank to the depositors thereof exceeds two per cent per annum; and that on or before the thirty-first day of October 1909, it will pay to the state treasurer a tax of seven twentieths of one per cent of the average amount of all such deposits so held by it.

This stipulation is made and is to be filed with said Commissioner in consideration and for the purpose of carrying out the provisions of the statutes of Vermont which provide that upon the making and filing hereof as aforesaid no depositor having an interest bear-
21 ing deposit or deposits in said bank whereon the rate of interest paid or allowed by said bank exceeds two per cent per annum shall be required on or before the twentieth day of April, 1909, to make returns to the State Treasurer and Commissioner of State Taxes showing the amount of such deposit or deposits in said bank on the first day of April 1909; and that no such depositor shall be required to pay to the State Treasurer on or before the thirty-first day of May 1909, a tax of seven twentieths of one per cent of the amount of such interest bearing deposit or deposits so held by said bank on the first day of April 1909.

This stipulation is also made and is to be filed as aforesaid for the purpose of obtaining from said Commissioner as the law provides a certificate in duplicate setting forth that the same has been filed and of showing that said bank has elected to pay and will pay to the State Treasurer on or before the thirty-first day of October, 1909, a tax of

seven twentieths of one per cent of the average amount of all such deposits held by said bank during the six months beginning with the first day of April 1909, on account of which the depositors thereof shall be by said bank paid or allowed interest exceeding the rate of two per cent per annum.

In witness whereof, said bank has on this 31st day of
22 March 1909, at Rutland in the State of Vermont caused its corporate name to be hereunto affixed by cashier duly empowered so to do by vote of said bank.

CLEMENT NAT. BANK.
By C. H. HARRISON, *Cashier.*"

That thereupon, to wit, on said first day of April 1909, the Commissioner of State Taxes issued in duplicate to said defendant, a certificate showing that it had filed such stipulation.

Whereby the said bank became liable to and promised to pay to the State of Vermont the amount of the tax imposed by law upon the depositors to whom such deposits belonged, to wit, the sum of seven twentieths (7/20) of one per cent of said average amount of such deposits, which tax amounted to the sum of Two Thousand Two Hundred and Ninety-nine Dollars and one Cent ($2,299.01), and which said sum of Two Thousand Two Hundred and Ninety-nine Dollars and One Cent ($2,299.01) the said bank, to wit, at said Rutland, to wit, on the first day of December 1909, faithfully promised the state of Vermont to pay to it, the said State of Vermont; yet, though often requested, the said bank has not paid the same but neglects and refuses so to do.

To the further damage of the plaintiff, as it says, in the sum of Two Thousand and Five Hundred Dollars ($2,500.) etc.

23 And afterwards, in vacation after the March term of this court, last aforesaid, again comes the said plaintiff by its said attorney, and on this 7th day of May 1910, by agreement of counsel files in the clerk's office of said court its second and third additional counts, which follow in these words, to wit:

Second Additional Count.

Also in a further plea of the case for that the defendant was on October 1, 1908, ever since has been and is a national bank, having its principal place of business in and doing business at Rutland, in said County of Rutland; that on October 1, 1908, and from thence forward each day to and including March 31, 1909, there was on deposit in said bank, by persons and corporations other than municipalities, corporations organized solely for charitable, educational or religious purposes, railroad, insurance, guaranty, express, telephone, telegraph, steamboat, car, transportation, sleeping car, parlor car, mortgage, loan or investment companies, savings banks, trust companies, savings bank and trust companies, national banks, deposits on which said bank paid or allowed interest exceeding the rate of two per cent per annum, and that the average amount of such deposits in said bank during such period was five hundred and seventy-

eight thousand six hundred and sixty-nine dollars and nineteen cents ($578,669.19);

That on October 1, 1908, in consideration that no depositor owning any such deposit should be required to make returns to
24 the State Treasurer of the State of Vermont and the commissioner of state taxes of the state of Vermont, showing the amount of his, the depositor's such deposit, and that no such depositor should be required to pay to the state treasurer of the state of Vermont the tax imposed by law on such deposit, to wit, seven-twentieths of one per cent thereof for the semi-annual period beginning October 1, 1908, and ending March 31, 1909, the said bank filed with the commissioner of state taxes of the state of Vermont, a stipulation duly signed by said bank by C. H. Harrison, its cashier, who was thereto and therefor duly authorized by the board of directors of said bank, which stipulation is in the words and figures following:—

STATE OF VERMONT:

The Clement National Bank, whose banking house is located at Rutland, in the State of Vermont for the consideration hereinafter named, hereby stipulates and agrees with the State of Vermont that on or before the thirtieth day of April 1909, it will make sworn returns to the State Treasurer and Commissioner of State Taxes showing the average amount of all deposits held by it during the six months beginning with the first day of October 1908, whereon the rate of interest paid or allowed by said bank to the depositors thereof exceeds two per cent per annum; and that on or before the thirtieth day of April 1909, it will pay to the State Treasurer a tax of seven-twentieths of one per cent of the average amount of all such deposits so held by it.

This stipulation is made and is to be filed with said Commissioner in consideration and for the purpose of carrying out the provisions of the statutes of Vermont which provide that upon the making and filing hereof as aforesaid no depositor having an interest bearing deposit or deposits in said bank whereon the rate of interest paid or allowed by said bank exceeds two per cent per annum shall be required on or before the 20th day of October 1908, to make returns to the State Treasurer and Commissioner of State Taxes showing the amount of such deposit or deposits in said bank on the first
25 day of October 1908; and that no such depositor shall be required to pay to the State Treasurer on or before the thirtieth day of November 1908 a tax of seven-twentieths of one per cent of the amount of such interest bearing deposit or deposits so held by said bank on the first day of October 1908.

This stipulation is also made and is to be filed as aforesaid for the purpose of obtaining from said Commissioner as the law provides a certificate in duplicate setting forth that the same has been filed and of showing that said bank has elected to pay and will pay to the State Treasurer on or before the thirtieth day of April 1909 a tax of seven-twentieths of one per cent of the average amount of all such deposits held by said bank during the six months beginning with the first day of October 1908 on account of which the depositors thereof shall be

by said bank paid or allowed interest exceeding the rate of two per cent per annum.

In witness whereof said bank has on this 30th day of September 1908 at Rutland, in the State of Vermont caused its corporate name to be hereunto affixed by its cashier duly empowered so to do by vote of said bank.

CLEMENT NATIONAL BANK,
Rutland, Vermont.
By C. H. HARRISON, *Cashier.*

That thereupon, to wit, on said first day of October, 1908, at Burlington aforesaid the commissioner of state taxes issued in duplicate to said defendant, a certificate showing that it had filed such stipulation, and then and there to wit at Rutland aforesaid delivered the same to said defendant.

Whereby the said bank became liable to and promised to pay to the state of Vermont on or before the thirtieth day of April 1909, at Rutland aforesaid the sum of two thousand twenty-five dollars and thirty-three cents, said last named sum being seven-twentieths
26 (7-20) of one per cent of said average amount of such deposits, and which said sum of two thousand twenty-five dollars and thirty-three cents the said bank, to wit, at said Rutland, to wit, on the thirtieth day of April, 1909, faithfully promised the state of Vermont to pay to it, the state of Vermont; yet though often requested, the said bank has not paid the same but neglects and refuses so to do."

Third Additional Count.

"Also in a further plea of the case for that the defendant was on October 1, 1908, ever since has been and is a national bank, having its principal place of business in and doing business at Rutland, in said County of Rutland; that on October 1, 1908, and from thence forward each day to and including March 31, 1909, there was on deposit in said bank, by persons and corporations other than municipalities, corporations organized solely for charitable, educational or religious purposes, railroad, insurance, guaranty, express, telephone, telegraph, steamboat, car, transportation sleeping car, parlor car, mortgage, loan or investment companies, savings banks, trust companies, savings bank and trust companies, national banks, deposits on which said bank paid or allowed interest exceeding the rate of two per cent per annum, and that the average amount of such deposits in said bank during such period was five hundred and seventy-eight thousand six hundred and sixty-nine dollars and nineteen cents ($578,669.19);

That on October 1, 1908, for the consideration therein expressed, the said bank filed with the commissioner of state taxes of the state of Vermont and delivered to the state of Vermont a stipulation duly signed by said bank by C. H. Harrison, its cashier, who was thereto and therefor duly authorized by the board of directors of said bank, which stipulation is in the words and figures following:—

27 STATE OF VERMONT:

The Clement National Bank, whose banking house is located at Rutland, in the State of Vermont for the consideration hereinafter named, hereby stipulates and agrees with the State of Vermont that on or before the thirtieth day of April 1909, it will make sworn returns to the State Treasurer and Commissioner of State Taxes showing the average amount of all deposits held by it during the six months beginning with the first day of October 1908, whereon the rate of interest paid or allowed by said bank to the depositors thereof exceeds two per cent per annum; and that on or before the thirtieth day of April 1909, it will pay to the State Treasurer a tax of seven twentieths of one per cent of the average amount of all such deposits so held by it.

This stipulation is made and is to be filed with said Commissioner in consideration and for the purpose of carrying out the provisions of the statutes of Vermont which provide that upon the making and filing hereof as aforesaid no depositor having an interest bearing deposit or deposits in said bank whereon the rate of interest paid or allowed by said bank exceeds two per cent per annum shall be required on or before the 20th day of October 1908, to make returns to the State Treasurer and Commissioner of State Taxes showing the amount of such deposit or deposits in said bank on the first day of October 1908; and that no such depositor shall be required to pay to the State Treasurer on or before the thirteith day of November 1908 a tax of seven-twentieths of one per cent of the amount of such interest bearing deposit or deposits so held by said bank on the first day of October 1908.

This stipulation is also made and is to be filed as aforesaid for the purpose of obtaining from said Commissioner as the law provides a certificate in duplicate setting forth that the same has been filed and of showing that said bank has elected to pay and will pay to the State Treasurer on or before the thirtieth day of April 1909 a tax of seven-twentieths of one per cent of the average amount of all such deposits held by said bank during the six months beginning
28 with the first day of October 1908 on account of which the depositors thereof shall be by said bank paid or allowed interest exceeding the rate of two per cent per annum.

In witness whereof said bank has on this 30th day of September 1908 at Rutland, in the State of Vermont caused its corporate name to be hereunto affixed by its cashier duly empowered so to do by vote of said bank.

CLEMENT NATIONAL BANK,
Rutland, Vermont.
By C. H. HARRISON, *Cashier.*

That thereupon, to wit, on said first day of October, 1908, at Burlington aforesaid the commissioner of state taxes issued in duplicate to said defendant, a certificate showing that it had filed such stipulation, and then and there to wit at Rutland aforesaid delivered the same to said defendant.

Whereby the said bank became liable to and promised to pay to

the state of Vermont on or before the thirtieth day of April 1909, at Rutland aforesaid the sum of two thousand twenty-five dollars and thirty-three cents, said last named sum being seven-twentieths (7-20) of one per cent of said average amount of such deposits, and which said sum of two thousand twenty-five dollars and thirty-three cents the said bank, to wit, at said Rutland, to wit, on the thirtieth day of April, 1909, faithfully promised the state of Vermont to pay to it, the state of Vermont; yet though often requested, the said bank has not paid the same but neglects and refuses so to do."

To the damage of the plaintiff as it says in the sum of two thousand twenty-five dollars and thirty-three cents, for the recovery of which with just costs the plaintiff brings suit.

29 And now, at the city of Rutland aforesaid, on this 12th day of May, 1910, in vacation after the March term of this court, last aforesaid, again come the said parties by their said respective attorneys, and by common consent file in the clerk's office of said court their agreed statement of facts, which follows in these words, to wit:

Agreed Statement of Facts.

The following statement of facts is hereby agreed upon, and all immaterial facts herein stated shall be disregarded by the Court in determining the cause.

I.

The defendant is a banking corporation organized under the Federal Statutes, and operating a bank at Rutland, Vermont; the stipulation set forth in the original declaration was by the defendant executed, delivered and filed with the commissioner of State Taxes, on October 1, 1908, under the provisions of Chapter 37, Public Statutes, a copy of said stipulation marked Exhibit A, is hereto attached and made a part hereof; said commissioner agreeably to the provisions of said chapter on said last named date issued and delivered to the defendant duplicate certificates, one of which was conspicuously posted in the public banking room of said bank, a copy whereof, marked Exhibit B, is hereto attached and made a part hereof. The defendant has filed no returns with the State Treasurer and Commissioner of State Taxes for the period
30 covered by said stipulation, and has not paid any part of the sum claimed to be due under the provisions thereof. The aforesaid chapter was originally No. 41 of the acts of 1906.

A copy of the blanks furnished by the state, for the semi-annual returns by national banks that file such stipulations, marked Exhibit C, is hereto attached and made a part hereof.

31 II.

The defendant for some years prior to the enactment in 1906 of the aforesaid chapter, and ever since, has allowed certain depositors, interest at a rate exceeding two per cent per annum, payable

on the first days of January and July, on such sums so deposited for such calendar months as such deposits have actually remained in its bank prior to said first days of January and July, except that such deposits made during the first days of any month are treated as having been made on the first day of said month; but such deposits bear no interest unless in the bank on January 1st, or July 1st. Certain other depositors receive certificates of deposit from the defendant, whereon it pays interest at the rate of three per cent per annum, for each calendar month during which such last named deposits remain in its bank.

III.

In practice, the defendant, in the past periods for which it has made payments under stipulations similar to the one hereinbefore mentioned, has treated all deposits of the character mentioned in the foregoing article as deposits upon which it would pay or allow interest at the aforesaid rates, notwithstanding a portion of such deposits were made, held and withdrawn in the manner set forth in articles VIII, IX and X. The averages mentioned in article VI, include all deposits held by the defendant of the character mentioned in the foregoing article.

IV.

Under the method of allowing interest on deposits as hereinbefore set forth, it is impossible for the defendant to determine at the time it is required to make its sworn returns for the periods ending the 30th day of September and the 31st day of March, semi-annually, upon what deposits it will pay or allow interest exceeding two per cent per annum from the 1st day of January next preceding the 31st day of March, and from the 1st day of July
32 next preceding the 30th day of September.

V.

Because of the defendant's compliance with Public Statutes, section 815, and the issuance of the certificate under section 816, none of the reports specified in sections 804 to 808, inclusive, were ever made or filed; no blanks specified in section 804 were ever applied for or furnished by the commissioner of state taxes to any resident depositors in the defendant's bank; the names of depositors were never reported to said commissioner, nor otherwise ascertained by him; no valuation was ever made of the aforesaid individual deposits by any state or other official during the period covered by said stipulation, nor was the amount of any such individual deposits, or the taxes thereon, so ascertained; and no notice of any character was ever given by said commissioner to any depositor in the defendant's bank.

VI.

The average amounts of all such deposits held by said defendant during the months and semi-annual period covered by said stipulation were as follows:

October,	1908.....	$573,744.97
November,	.....	588,614.94
December,	.....	593,489.43
January,	1909.....	603,959.88
February	.....	599,408.83
March,	.....	606,928.44

Average for Period, $594,357.74.

The aforesaid monthly averages are ascertained by averaging the aggregate deposits held by the defendant at the close of each day, and the average for the semi-annual period by averaging the monthly averages. Deposits mentioned in articles VIII, IX and X, were used in making such averages.

33 Prior to April 1, 1909, the defendant made returns of the character specified in the first mentioned stipulation. It therein included deposits of non-residents, because the commissioner of state taxes claiming to act within his authority, and under the advice of the attorney general, insisted thereon. No other state official has acted or assumed to act in the premises; and no claim is made that any officer other than said commissioner has authority to so act. The plaintiff insists that the average deposits whereon it seeks to recover, should be so computed.

The average deposits exempted for the period in question, under the provision of section 819, was $15,688.15; and the net average was for such period $578,669.19, whereon the state seeks to recover $2,025.33, as set forth in the declaration.

VII.

Deposits mentioned in the foregoing article belonged to upwards of one thousand depositors, sixty-eight of whom reside without this state, and the remaining number in upwards of fifty-two towns and cities in this state.

VIII.

Deposits to the amount of $4,514, were made subsequent to July 1, 1908, and were withdrawn prior to January 1, 1909; and deposits to the amount of $3,002.12 were made subsequent to January 1, 1909, and withdrawn, prior to July 1, 1909, some being withdrawn prior to April 1, and some subsequent thereto. No interest was paid by the defendant on any of the deposits mentioned in this article.

IX.

Deposits to the amount of $7,969.24 were made after October 1, 1908, and were withdrawn prior to April 1, 1909, of which $5,723.29 were in the bank January 1, 1909, and drew interest at the aforesaid rate; deposits in said bank on October 1, 1908, to the amount of $20,726.28 whereon interest at said rate was then allowed by the defendant, were withdrawn prior to March

34 31, 1909. Eleven of the individual depositors having interest bearing deposits, not exceeding in the aggregate

$4,561.95 became such after October 1, 1908, and ceased to be depositors before March 31, 1909; and forty-eight depositors of this class having deposits on October 1, 1908, not exceeding in the aggregate $22,530.54 ceased to be depositors before March 31, 1909.

X.

On April 1, 1908, the aggregate of such interest-bearing deposits was $467,844.88, of which $32,917.44 was deposited by persons living and having their residence and domicile without this state; on October 1, 1908, such aggregate was $569,393.75, of which $36,424.27 was deposited by such non-residents; and on April 1, 1909, such aggregate was $623,242.75, of which $39,361.98 was deposited by such non-residents. The aforesaid aggregate on the last named date was $28,885.01 in excess of the average for the semi-annual period ending March 31, 1909.

XI.

The non-resident depositors hereinbefore referred to, had not on October 1, 1908, on April 1, 1909, or between said dates, agents or representatives in this state, who handled, invested or controlled the moneys deposited in the names of such non-resident depositors; the bank books or certificates evidencing such deposits were not present in this state at any of said times; and such deposits were not held by said non-residents as trustees of any person resident in the state.

XII.

When the law in question became operative, the defendant had resident and non-resident depositors upon whose deposits by contracts then in force it paid or allowed interest in excess of two per cent per annum. The amount of such deposits due resident depositors was $468,286.10, all of which is still in said bank.
35 The amount of such deposits due non-resident depositors was $32,878.29, of which all but $422.39 heretofore paid to three non-resident depositors is still in said bank. For the purpose of showing the nature and character of the last mentioned contracts, copies of the pass books, issued by the defendant and marked Exhibits D and E, and a copy of the certificates of deposit so issued marked Exhibit F are hereby referred to and made a part hereof.

XIII.

The average local tax rate throughout the state for the year beginning April 1, 1908, was $16.70 per $1,000 of taxable property set in the grand list; the minimum being $7.50 per $1,000, and the maximum being $39.80 per $1,000.

XIV.

The defendant had on deposit in its bank for the period covered by said stipulation large sums of money subject to check and not bearing interest, or on which the rate of interest did not exceed two percent per annum.

XV.

There were in the State of Vermont, during the period covered by said stipulation, forty-nine savings banks, savings institutions and trust companies.

XVI.

During the period covered by said stipulation, and prior thereto, the defendant caused to be published in local newspapers advertisements containing among other things, the following phrases, which are representative of the character of its advertisements:

(a) "We pay you interest at 3½ percent and also pay the taxes."

(b) "No reports to make, or taxes to pay."

36 (c) "We pay taxes on deposits of any amount."

(d) "We pay 4 percent on savings accounts, in any amount from one dollar upwards. All taxes are paid by the bank, and you do not need to report deposits in this bank to the listers."

(e) "We pay 4 percent interest on accounts large and small,—no limit."

(f) "Taxes on savings deposits in this bank are paid by us, and you do not need to report your deposits to the listers. We do not limit our depositors to $2,000, but pay taxes, on any amount from one dollar upwards."

(g) "Be sure and take advantage of the law governing taxes on deposits in National banks. Our depositors do not make any report of their deposits to the listers."

(h) "Under the law governing savings deposits in National banks, we pay all taxes on any amount. There is no $2,000 limit. You can carry any amount tax free, and no report of your deposit is made by the bank to the listers."

(i) "We pay the taxes on deposits of any amount from one dollar upwards. The taxes are paid on average deposits, and the names of the depositors are not given by the bank."

XVII.

Pleas of the general issue and ultra vires are treated as having been filed and all formal pleas by both parties are hereby waived.

XVIII.

The foregoing seventeen articles are to be considered in determining what judgment shall be rendered for the period beginning October 1, 1908, and ending March 31, 1909.

37 XIX.

In case the final judgment of the court is in favor of the state to recover $2025.33, for the period beginning October 1, 1908, and ending March 31, 1909, then the state shall also have judgment for $2299.01 for the period beginning April 1, 1909 and ending September 30, 1909.

In case the state has judgment for a less sum than $2025.33 for the first period above mentioned, then judgment shall be rendered for such portion of $2299.01 for the last named period as will conform to the holding of the court upon the first period. But the plaintiff is not to recover on the second period unless it does on the first.

And thereupon, the said parties having waived their right to a trial by jury upon the issues aforesaid, whereof they have put themselves upon the country, and having consented to a hearing in vacation, said issues are submitted to the presiding judge of this court on this 12th day of May 1910, upon the concessions in writing of said parties as aforesaid.

Whereupon, it is considered by the court pro forma and without hearing that the said defendant did assume and promise, etc., in manner and form as the plaintiff in its declaration has alleged, and that by reason of said facts so stated the said plaintiff has sustained damage to the amount of four thousand three hundred twenty-four dollars and thirty-four cents.

38 Therefore, it is considered and adjudged by the court that said plaintiff have judgment against the said defendant upon the declaration aforesaid, and do recover of it the said sum of four thousand three hundred twenty-four dollars and thirty-four cents, damages, together with said plaintiff's reasonable costs in this action, to be taxed by the clerk of this court; and that thereof said plaintiff may have execution against the said defendant on and after the 13th day of May 1910;

And thereupon, the said defendant comes by M. C. Webber, its attorney and excepts to the rulings and determinations of this court upon the several issues and questions of law arising upon the trial of this cause, as the same are placed upon the record by the allowance of this court; and on this 12th day of May 1910, files with the clerk of this court its bill of exceptions, signed by the Hon. Alfred A. Hall, the presiding judge of said court, at the last stated term aforesaid.

And thereupon, it is further ordered by the court that the said issues and questions of law, arising as aforesaid, in said cause, be passed to the Supreme Court of Judicature of the State of Vermont for a final decision; and that said execution be stayed until after the hearing and final determination of said exceptions by said Supreme Court.

Done by order of said court, at the city of Rutland, in said county, this 12th day of May, 1910.

H. A. HARMAN, *Clerk.*

39 *Exhibits.*

EXHIBIT "A."

STATE OF VERMONT:

The Clement National Bank, whose banking house is located at Rutland, in the State of Vermont for the consideration hereinafter named, hereby stipulates and agrees with the State of Vermont that on or before the thirtieth day of April 1909, it will make sworn returns to the State Treasurer and Commissioner of State Taxes showing the average amount of all deposits held by it during the six months beginning with the first day of October 1908, whereon the rate of interest paid or allowed by said bank to the depositors thereof exceeds two per cent per annum; and that on or before the thirtieth day of April 1909, it will pay to the State Treasurer a tax of seven-twentieths of one per cent of the average amount of all such deposits so held by it.

This stipulation is made and is to be filed with said Commissioner in consideration and for the purpose of carrying out the provisions of the statutes of Vermont which provides that upon the making and filing hereof as aforesaid no depositor having an interest bearing deposit or deposits in said bank whereon the rate of interest paid or allowed by said bank exceeds two per cent per annum shall be required on or before the 20th day of October 1908, to make returns to the State Treasurer and Commissioner of State Taxes showing the amount of such deposit or deposits in said bank on the first day of October 1908; and that no such depositor shall be required to pay to the State Treasurer on or before the thirtieth day of November 1908 a tax of seven-twentieths of one per cent of the amount of such interest bearing deposit or deposits so held by said bank on the first day of October 1908.

This stipulation is also made and is to be filed as aforesaid for the purpose of obtaining from said Commissioner as the law pro-
40 vides a certificate in duplicate setting forth that the same has been filed and of showing that said bank has elected to pay and will pay to the State Treasurer on or before the thirtieth day of April 1909 a tax of seven-twentieths of one per cent of the average amount of all such deposits held by said bank during the six months beginning with the first day of October 1908 on account of which the depositors thereof shall be by said bank paid or allowed interest exceeding the rate of two per cent per annum.

In witness whereof said bank has on this 30th day of September 1908 at Rutland, in the State of Vermont caused its corporate name to be hereunto affixed by its cashier duly empowered so to do by vote of said bank.

CLEMENT NATIONAL BANK.
Rutland, Vermont.
By C. H. HARRISON, *Cashier.*

Endorsed: Received October 1, 1908, J. E. Cushman, Commissioner of State Taxes.

EXHIBIT "B."

STATE OF VERMONT,
Office of the Commissioner of State Taxes:

This certifies that the Clement National Bank has this day filed with the Commissioner of State Taxes a stipulation that said bank has elected to pay and will pay to the State of Vermont the tax required by law upon all interest bearing deposits held by it during the six months beginning October 1, 1908, whereon the rate of interest exceeds two per cent per annum; and that it will file with the State Treasurer and Commissioner of State Taxes sworn returns showing the average amount of such deposits held by it during said period.

41 Depositors having deposits in said bank whereon the rate of interest exceeds two per cent per annum, are therefore not required to make returns thereof to the State Treasurer or Commissioner of State Taxes.

Given under my hand at Burlington, Vermont, this first day of October, 1908.

J. E. CUSHMAN,
Commissioner of State Taxes.

EXHIBIT "C."

STATE OF VERMONT:

Statement of the —— located at ——
Vermont for the semi-annual period ending March 31, 1909.

The following answers to the interrogatories herein contained are true and correct statements touching the above named corporation, and are made in compliance with the provisions of a stipulation filed in the office of the Commissioner of State Taxes on the — day of —— 1908.

1. What was the average amount of all deposits of whatever nature, whether evidenced by certificate of deposit, pass books or otherwise held by the National bank in whose behalf this return is made during the six months ending with the last day of March, 1909, on account of which the depositors thereof have heretofore been paid or allowed or shall hereafter be paid or allowed interest exceeding the rate of two per cent per annum,—said average unless otherwise indicated to be computed by using the daily amounts of such deposits?

42 Average amount held in October, 1908, $_____
November, _____
December, _____
January, 1909, _____
February, _____
March, _____
Total, _____
Average, $_____

2. What was the average amount of all such interest bearing deposits computed as stated in the last preceding question held by said national bank and deposited by municipalities, corporations or societies organized solely for charitable, educational or religious purposes; railroad, insurance, guaranty, express, telegraph, telephone, steamboat, car, transportation, sleeping car and parlor car companies; savings banks, trust companies, savings bank and trust companies; mortgage, loan or investment companies; and other national banks?

Average amount held in October, 1908, $———
November, ———
December, ———
January, 1909, ———
February, ———
March, ———
Total, ———
Average, $———

Balance subject to taxation ..... $———
Tax at 7-20 of 1% for six months ..... $———

(Signature) ———
(Official Character) ———

43 I —— —— of —— in the County of —— and State of Vermont, on oath depose and say that I am the —— of the national bank in whose behalf the foregoing return by me subscribed is made; that the answers to the questions therein contained are true and correct; that the average amount set down in answer to the first question therein contained is the average amount of all deposits, whereon said bank has paid or allowed interest in excess of the rate of 2 per cent per annum, held by said bank during the respective periods therein mentioned; and that the answer to question two contains no deposits except such as draw interest at the rate last hereon mentioned.

—— ——.

STATE OF VERMONT,
—— *County, ss:*

At —— in said county on this —— day of —— 1909, personally appeared —— —— and made solemn oath that the above statement and affidavit by him signed is true.

Before me,

—— ——.

44 EXHIBIT "D."

The following is a copy of the printed portions of Exhibit D.

(Copy of Front Page.)

No. —.

The Clement National Bank,

of Rutland, Vermont,

Savings Department,

in account with

_____

Read this Book and keep it safe; if you lose or mislay it, give immediate notice to the Bank.

(Copy of First and Subsequent Pages.)

Clement National Bank,

Savings Department.

Date.	Deposited.	Withdrawn.	Balance.

45 (Copy of Matter Printed in Back of Book.)

The Clement National Bank

of Rutland, Vermont,

Has Established a

Savings or Interest Department

for the purpose of receiving deposits of individuals, firms and societies seeking income from money in abeyance or at rest and to

furnish a safe and profitable place of deposit for the savings and accumulations of all classes of Depositors.

It offers to the public the advantages of Its Capital and Surplus, and its investment in United States Bonds and the additional liability of its stockholders.

It guarantees the payment of its deposits and interest thereby securing Depositors against all losses.

Rules and Regulations.

This Bank will receive special deposits in its savings department upon the following terms.

Conditions of Deposit.

The smallest sum put on interest shall be One Dollar and no fractional part of a dollar shall draw interest.

Deposits made during the first five days of any month will draw interest from the first day of that month and those made after that during the month, will draw interest from the first day of the following month.

Interest at such rates as may be fixed by the board of Directors, will be credited to depositors on the first days of January and July, and this interest will draw interest from date of such credit.

46 Compounding Twice in Every Year

without trouble or care to the depositor.

No interest will be paid on any sum withdrawn, for the time which has elapsed since the last interest period.

Deposit Receipts.

The Bank will also issue Deposit Receipts, payable on demand, with interest at such rates as may be agreed upon.

The interest on these Receipts will be paid at the end of every six months after their date and endorsed upon the receipt when presented for such purpose, unless otherwise specified in the Receipt.

Although the Bank will endeavor to prevent fraud on its depositors, yet the certificate, or book of deposit, will be evidence that the person producing the same is legally authorized to receive the deposit, and the Bank will not be responsible for loss sustained when the book or certificate of deposit is so produced, and the money paid and entered thereon, unless the depositor has given notice to the Cashier that the said certificate or book has been lost or stolen; and such payment, so made and entered on such book, or paid on such certificate so produced, shall discharge the Bank from all further claims from any one, for the amount so paid.

Upon satisfactory proof being made of the loss or destruction of any book or certificate of deposit, the Directors may order the pay-

ment of the amount due thereon without the production of the book or certificate of deposit, ten days after the proof of such loss or destruction; and in case of such payment by the Bank, it shall be discharged from all further claim on account of such deposit, unless it shall receive notice that said book or certificate is in existence before such payment is made.

Books of deposit may be assigned or transferred by the depositor, by giving notice to the Bank and having a record of the same made upon the Books of the Bank and also upon the book of the depositor.

47 If payment be made as aforesaid without notice of the assignment, the Bank will not be liable to pay the same to such assignee or holder, but will be fully discharged therefrom.

The Bank shall have the right to return any special deposit in whole or part and to refuse to receive the deposit of any individual or association whenever they think proper.

These Deposits may be withdrawn on demand, provided that whenever the Directors deem it for the interest of the Bank and shall so order, no money shall be withdrawn except after sixty days' notice.

All depositors receiving a Pass Book, with the foregoing rules and regulations printed therein, shall be considered as assenting to them and shall be bound by them.

These rules and regulations may be altered or revised by a vote of the Directors, and in case any alteration affecting Depositors is made at any time, due notice of such change will be given to each Depositor by mail, directed to the Post Office address furnished by the Depositor at the time of making the deposit.

Exhibit "E."

Exhibits D and E are identical, except that in exhibit E, between the matter printed on pages 18 and 19 hereof, the following paragraph appears:

The said Bank reserves the right to change the rate of interest upon any deposit in this book at any interest period upon notice of ten days sent by mail to the address upon the cover hereof, or to discontinue all interest thereon upon same notice and upon the reduction of rate or discontinuance of interest said bank will pay the amount due upon this book on demand and without previous notice.

48 EXHIBIT F.

Copy of Certificate of Deposit.

No. 1388. The

$..... CLEMENT NATIONAL BANK

of

Rutland, Vt.

.....190...

This certifies that.....

of .....ha...deposited in this Bank

... . Dollars

Payable to the order of..... .....on.....

notice on return of this Certificate properly endorsed. Interest will be allowed at the rate of..... per cent. per annum, payable annually, for months only commencing..... . The right is reserved on.....notice to discontinue the interest, or pay off the principal.

C. H. HARRISON,
Cashier.

Notices of reduction or cessation of interest shall be sufficient if sent by mail to the address given hereon.

49 STATE OF VERMONT:

Rutland County Court, March Term, 1910.

STATE OF VERMONT
v.
THE CLEMENT NATIONAL BANK.

Assumpsit.

Defendant's Bill of Exception.

Heard on an agreed statement of facts. On hearing the defendant claimed and insisted as follows:

(1) That on the material facts agreed upon the defendant claims that the plaintiff is not entitled to recover.

(2) That there had been no actual or legal assessment of the tax and for that reason alone the defendant could not be held on the stipulation.

(3) That the tax had been provided by the act to be assessed against the individual depositors on their deposits in said bank, but such assessment had never been completed and effected; and that the stipulation was to pay a different sum and a different thing from the amount of the tax attempted to be assessed, and was without consideration.

(4) That the bank was without power to enter into said stipulation, and that the same constituted an act ultra vires.

(5) That the stipulation was an incomplete novation, illegal and non-enforceable, on that ground also, as there was no previous valid obligation in that the tax had not been assessed by the act nor completed and made effective by a valuation and levy, nor did the depositors agree to such stipulation and the said stipulation was invalid as ultra vires. Also, the stipulation calls upon the bank to contract for an indefinite number of depositors or persons primarily required to pay the tax.

50 (6) That the act in question is unconstitutional and makes an unlawful discrimination between depositors in national banks and depositors in state savings banks and trust companies, and, also between national banks as such and state banks as such, and between individual depositors in national banks and between individuals generally, and an unlawful discrimination against national banks.

(7) That the act in question is in violation of article 9 of the constitution of the state of Vermont, and illegal in other respects, in that the tax is not proportional or apportioned and not uniform. The tax rate is different from that on the same class of property in the hands of other persons and tax payers, the method of assessment and collection is different, and the classification is not the same as made on like property owned by other tax payers, is not reasonable and is unusual and arbitrary and based on no distinction and takes the property of citizens and of the defendant and of its depositors without due process of law. No notice was given to the individual depositor and he had no opportunity to be heard.

(8) That the act is in violation of the fifth and fourteenth amendments of the constitution of the United States, in that the tax is not uniform and the act causes discrimination and creates inequality in the burdens of taxation and takes property of the defendant and of other citizens of Vermont and of other states without due process of law; the act denies to a class of citizens the equal protection of the laws; and, also, the act results in a lack of uniformity of taxation upon the same class of subjects, to wit, deposits in national banks, and between deposits in national banks and state banks.

(9) That the act is illegal because it undertakes to tax the deposits of non-residents of the state of Vermont, making no distinction between residents and non-residents in the provisions as to the average of deposits on which the bank must pay the tax, and requiring the deposits of non-resident depositors to be included therein.

51 (10) That in reality the tax the bank is required to pay is one upon the franchise of the bank, based upon the average of its deposits of the class created, and the act is therefore illegal and unconstitutional.

(11) That the act discriminates between national banks and individuals in that it taxes the same class of choses in action at a different rate in the one case than in the other; and in that the act is a state tax on a class and is a different tax at a different rate from the tax on the same class of property in the hands of individuals. Also it discriminates against national banks in that it requires to be disclosed the name of the bank holding deposits of the class sought to be taxed.

(12) That the stipulation created no legal obligation.

(13) That the bank cannot make itself good for all it has to pay the state, as the average of deposits on which it is required to pay the tax includes deposits that have been withdrawn before the amount became due under the stipulation.

(14) That the act is unconstitutional in that it impairs vested rights of depositors of the bank under their contracts therewith.

The foregoing claims were considered as if made under appropriate pleas. The court overruled these claims and rendered judgment pro forma and without hearing for the plaintiff to recover the sum of $2025.33 for the semi-annual period beginning October 1, 1908 and ending March 31, 1909; and the additional sum of $2299.01 for the semi-annual period beginning April 1, 1909 and ending September 30, 1909, agreeably to Article XIX, of the agreed statements of facts; and that the plaintiff recover its costs; to all of which the defendant seasonably excepted. Exceptions allowed, execution stayed, and cause passed to the Supreme Court.

ALFRED A. HALL,
Presiding Judge.

52 And day thereof is given until the next stated General term of the Supreme Court for the said county of Rutland, begun and held at Montpelier, in the county of Washington, on the first Tuesday in May 1910.

And now, at the term of this court last aforesaid, at Montpelier aforesaid, again comes the said defendant by its said attorneys; and the said State of Vermont comes also by Clarke C. Fitts its attorney; and the matters aforesaid, in the said bill of exceptions contained, are submitted to the court, with the arguments of counsel.

And because the judges of this court will advise themselves upon the premises before they give judgment thereon, a day thereof is given, from term to term until the stated General term of this court, begun and held at Montpelier aforesaid, on the first Tuesday in January, 1911.

And now, at the term of this court last aforesaid, at Montpelier aforesaid, again come the parties aforesaid by their said respective attorneys; and by agreement of said parties, on this 12th. day of

January 1911, the said parties file in said court an additional statement of facts, which follows in these words, to wit:

53 STATE OF VERMONT:

Supreme Court, January Term, 1911.

STATE OF VERMONT
v.
CLEMENT NATIONAL BANK.

It is hereby stipulated by and between the respective parties hereto that the following additional statement of fact may be added to and considered a part of the Agreed Statement of Facts upon which the case was heard in the Supreme Court, viz:

For the period from October 1, 1908 to April 1, 1909, the average of non resident deposits was the sum of $37,892.

For the period from April 1, 1909 to October 1, 1909, the average of non-resident deposits was the sum of $57,678.

Dated January 4, 1911.

CLARKE C. FITTS,
Attorney for Plaintiff.
M. C. WEBBER,
Attorney for Defendant.

Whereupon, it is considered by the court that the judgment aforesaid of the said county court is in some respects erroneous and defective.

Therefore, it is considered and adjudged by the court that the aforesaid judgment of the said county court be reversed; that the said State of Vermont do recover of the said defendant the Clement National Bank, the sum of three thousand nine hundred
54 eighty-nine dollars and eighty-five cents damages, based upon the aforesaid statements of fact; together with the reasonable costs of the State in this action, to be taxed by the clerk of this court; that thereof the said State may have execution against the said defendant on and after the 16th. day of January, 1911.

Done by order of said court, at the city of Rutland, in said county of Rutland, this 16th. day of January, 1911.

H. A. HARMAN, *Clerk.*

55 STATE OF VERMONT:

Supreme Court, Rutland County.

Docket No. 6776.

STATE OF VERMONT
v.
CLEMENT NATIONAL BANK.

On this 15th. day of March 1911, at the city of Rutland in said county, the opinion of the court in the above entitled cause was

filed in the clerk's office of said court for the said county of Rutland, which opinion follows in these words, to wit:

"May T., 1910; Before All.

MUNSON, *J.*:

This cause involves the construction and validity of certain provisions of chapter 37 of the Public Statutes, containing sections 804-820, and relating to the taxation of National bank deposits.

Section 804 provides in substance that every person having an interest bearing deposit in a National bank in this State on the first day of April and October shall within twenty days thereafter report the amount thereof and the name of such bank to the commissioner of state taxes. Section 805, in connection with 806, provides that every resident of the State having such a deposit shall annually report to the listers of the town wherein he re-
56 sides, in his tax inventory, the names of all banks located in this State wherein he then has or has had any such deposits during the year next preceding the first day of April, and the amount of such deposits. Section 807 provides that the listers in every town shall, on or before the tenth day of May, report to the commissioner of state taxes the names of all persons whose inventories show that they had interest bearing deposits in a National bank in this State on the first day of the preceding April, together with the amount of each individual deposit, and the name of the bank holding it. Section 808 provides that such report shall be kept on file for three years after the taxes based on them become due, and be subject to the inspection of certain officials, one of whom is the State's Attorney of the county wherein such bank has its principal place of business, or wherein said depositor, if a resident of this State, has his domicile. Section 809 provides that every person having such a deposit in a National bank in this State shall semi-annually pay a tax to the State, and assess such tax at the rate of seven-twentieths of one per cent semi-annually upon the amount of the deposit held by such bank on the first day of April and October, and requires that such taxes be paid to the State Treasurer semi-annually on or before the last day of May and November. Section 810 provides that no other tax shall be
57 assessed on such deposits, nor against the depositors on account thereof. Section 811 provides that a depositor who wilfully fails to make such returns or pay such taxes shall forfeit ten per cent of such deposit to the use of the State for each month's delay in filing such return, and that such tax and forfeiture may be recovered in an action on the statute.

It is further provided by sections 814-816 that if a National bank in this State so elects it may pay to the State the taxes provided for as above, and that is shall be lawful for such bank to deduct the taxes so paid from the interest or deposits then or thereafter held by it belonging to the person from whom such tax became due; that if a bank elects to pay such taxes to the State, and to make certain returns elsewhere provided for, it shall semi-annually, on or before the first day of April and October, file with the com-

missioner of State taxes a stipulation setting forth such fact, and that the commissioner shall thereupon issue to the bank a certificate in duplicate showing such filing; that a bank filing such stipulation shall thereupon become liable to make such returns, and liable to the State for such tax for the six months named in such stipulation, and that no depositor in such bank shall be required to make the returns before specified for such six months' period. Section
58 817 provides that "every bank filing such stipulation shall thereupon become liable to the State for the amount of such tax of seven-twentieths of one per cent of the average amount of such deposits held by such bank during the six months beginning with the first day of April and October respectively, for which such stipulation was filed."

The returns to be made by a bank, in case it elects to pay such taxes, are specified in section 818, which provides that if a bank files such a stipulation on or before the first day of April, it shall, on or before the thirty-first day of the following October, file with the State treasurer and the commissioner of State taxes a return showing the average amount of such deposits for the six months ending on the thirtieth day of September in that year, and shall pay to the State treasurer the amount of such semi-annual tax; and that if a bank files a like stipulation on or before the first day of October, it shall file with said officers, on or before the thirtieth day of the following April, a return showing the average amount of such deposits for the six months ending with the thirty-first day of March next preceding the making of such return, and shall pay the tax for such semi-annual period.

The State sues on a stipulation filed by the defendant under the foregoing provisions on the first day of October, 1908. By this stip-
ulation the defendant agreed with the State that on or before
59 the thirtieth day of April 1909, it would make sworn returns to the State treasurer and the commissioner of State taxes showing the average amount of all deposits held by it during the six months beginning with the first day of October, 1908, whereon the rate of interest paid or allowed by it to the depositors thereof exceeded two per cent per annum, and that on or before the thirtieth day of April, 1909, it would pay to the State treasurer a tax of seven-twentieths of one per cent of the average amount of all such deposits. This agreement was expressed to be in consideration of and for the purpose of carrying out the statutory provisions which relieve the depositor from the making of returns and the payment of a tax in case such a stipulation is filed.

The case is presented by an agreed statement from which the following facts appear. For several years the defendant has allowed certain depositors interest at a rate exceeding two per cent per annum, payable on the first day of January and July, for such calendar months as their deposits have remained in the bank prior to the days named; but no interest is paid on such deposits unless they are in the bank on January first or July first. The bank has other depositors who receive certificates on which interest is paid at the rate of three per cent per annum for each calendar month during

which the deposit remains in the bank. Certain deposits were made subsequent to July 1, 1908, and withdrawn prior to January
60 1, 1909, and others were made subsequent to January 1, 1909, and withdrawn prior to July 1, 1909, some being withdrawn before and some after April first; and no interest was paid on any of these deposits. Some deposits were made after October 1, 1908, and withdrawn prior to April 1, 1909, part of which were in the bank January 1, 1909, and drew interest at the aforesaid rate. There were also deposits in the bank on October 1, 1908, whereon interest at said rate was then allowed, which were withdrawn prior to March 31, 1909. Some persons who had deposits on October 1, 1908, and some who became depositors after that date, ceased to be depositors before March 31, 1909. Part of the interest bearing deposits in the bank on April 1, 1908, October 1, 1908 and April 1, 1909, were deposited by persons residing without this State. The aggregate of interest bearing deposits at the last named date was $28,885.01 in excess of the average for the semi-annual period ending March 31, 1909. The defendant has made payments under previous stipulations like the one in question, and in so doing it has treated all these deposits upon which it would pay or allow interest at the aforesaid rates, notwithstanding some of them were held and withdrawn as above stated. Under this method of allowing interest on deposits it is impossible for the defendant to determine at the time it is required to make its sworn returns for the periods ending September thirtieth, and March thirty-first semi-annually, on what deposits it will pay or allow interest ex-
61 ceeding two per cent per annum from the first day of January next preceding the thirty-first day of March, and from the first day of July next preceding the thirtieth day of September.

A few obvious considerations present themselves at the threshold of our inquiry. The suit is upon the bank's agreement to pay the taxes of its depositors, and not for the collection of a tax as such. The claim is not contested by the persons whose property is chargeable with the amount to be paid, but by the bank which has assumed the payment under statutory authorization. Those upon whom the tax was imposed have been omitted from the tax list because of the undertaking of their depositary. The substitution of the bank for the depositor as the one responsible for the payment of the tax, was effected by its own act.

The arguments of counsel are based in part upon certain undisputed propositions. The taxing power of the State extends to all persons and property within its jurisdiction not protected therefrom by Federal supremacy. Kirtland v. Hotchkiss, 100 U. S. 491; 25 L. Ed. 558; Catlin v. Hull, 21 Vt. 152. National banks are instrumentalities of the Federal government, and as such are necessarily under the paramount authority of the United States. Davis v. Elmira Savings Bank, 161 U. S. 357; 40 L. Ed. 700; Hawley v. Hurd 72 Vt. 122. There can be no State taxation of a National
62 Bank without the consent of Congress. Mercantile etc. Bank v. City of New York, 121 U. S. 138; 30 L. Ed. 895. The only taxation permitted is upon the real estate of the bank and its

shares of stock as the property of its stockholders, and this does not authorize a taxation of the bank's franchise in lieu of the taxation of shares. Owensboro National Bank v. Owensboro, 173 U. S. 664; 43 L. Ed. 850. A franchise tax is a tax upon the privilege of doing business under corporate organization; and the tax of seven-tenths of one per cent upon the average amount of deposits, imposed upon the savings institutions of this State by sections 744 and 745 of the Public Statutes, is a franchise tax. State v. Bradford Savings Bank, 71 Vt. 234; State v. Franklin County Savings Bank, 74 Vt. 246. The provision of the Federal Constitution which secures to all the equal protection of the laws does not prevent a classification of property for the purposes of taxation, but it requires that the classification be based on some distinction which bears a just relation to the purpose of the enactment. Magoun v. Illinois, etc. Bank, 170 U. S. 283; 42 L. Ed. 1037; State v. Hoyt, 71 Vt. 59.

The first subject of inquiry is whether there was a valid consideration for the agreement sued upon, and this involves an in-
63 quiry as the validity of the tax left uncollected because of the agreement; and, in view of the acknowledged limit of taxation as against the bank, the first point for consideration is the status of the deposit as regards ownership, and the nature of the property taxed under the name of "deposits."

Money deposited in a bank without special arrangement becomes the property of the bank, and properly available for use in its business; and the depositor becomes a creditor of the bank to the amount of the deposit. Bouv. Dict. Tit. Deposit 3 Ency. Law 827; Note 19 Am. Dec. 418; 1 Morse on Banking, §289; State v. Franklin Co. Savings Bank, 74 Vt. 246. This doctrine of the law of banking was well settled when National banks were created and authorized to receive deposits. Bank of Kentucky v. Wister, 2 Peters 318; 7 L. Ed. 437; Foley v. Hill, 2 H. L. Cas. 28; Matter of Franklin Bank, 1 Paige (N. Y.) 249; 19 Am. Dec. 413; Northern Liberties Bank v. Jones, 42 Pa. St. 536; Coffin v. Anderson, 4 Black 395. The application of the doctrine to the business of National banks was authoritatively recognized early in their history. Marine Bank v. Fulton Bank, 2 Wall. 252; 17 L. Ed. 785; Thompson v. Riggs, 5 Wall. 663; 18 L. Ed. 704. It was said in National Bank v. Millard, 10 Wall. 152; 19 L. Ed. 897, in view of the cases last cited, that it was no longer open to question in that Court that the relation be-
tween the bank and an ordinary depositor was that of debtor
64 and creditor. This conclusion has since remained undisturbed. Manhattan Co. v. Blake, 148 U. S. 412; 37 L. Ed. 504; National Bank v. Massey, 192 U. S. 138; 48 L. Ed. 380.

The defendant argues that by the terms of the statute the tax is upon the deposits, and that inasmuch as the deposits are the property of the bank, and properly used in its business, the tax is upon the property or business of the bank. But the language of the statute does not require this conclusion. The transaction which makes the money the property of the bank gives the depositor a credit of equal amount, and the term "deposit" may be used to indicate the money deposited or the credit which the depositor receives for it. The last

must be taken to be meaning here, for the statute lays the tax upon the depositor in so many words. The credit arising from the transaction is properly taxable to the depositor under our statute unless the debtor's status as a National bank secures its exemption.

The deposits of a bank increase its capacity for doing business, but they are not capital stock in any view. Society for Savings v. Coite, 6 Wall. 561; 18 L. Ed. 897. The capital stock of National banks is taxed to the individual holders by permission of Congress, and could not be taxed without such permission. State of New York v. Weaver, 100 U. S. 539; 25 L. Ed. 705. But it does not
65 follow that Congressional authority is needed to enable the State to tax National bank deposits to the depositors. There is no similarity between capital stock and deposits. The capital stock of a bank is the sum on which it is authorized to do business and the permanent basis of its credit. A general deposit is a loan to the bank, and the right of the depositor a mere chose in action. Scammon v. Kimball, 92 U. S. 362; 23 L. Ed. 483; Davis v. Elmira Savings Bank, 161 U. S. 275; 40 L. Ed. 700; National Bank v. Millard, 10 Wall. 152; 19 L. Ed. 897. It is true that deposits become a part of the working capital of the bank, and that any taxation of the depositors may have a tendency to lessen this resource; but it can hardly be supposed that the efficiency of National banks as instrumentalities of the Federal government will be endangered by any taxation of depositors which is free from unjust discrimination. If the defendant's contention is correct, all the uninvested capital of the State can escape taxation by seeking a refuge in National Banks. We find nothing in the utterances of the Federal Supreme Court to indicate that this curtailment of the taxing power of the State was intended by Congress. On the contrary, it has been said that implied prohibitions of taxation must not be extended so far as to destroy the necessary powers of the States or prevent their efficient exercise; that in regulating the taxation of National bank shares it
66 was not the intention of Congress to interfere with the taxing power of the State further than was necessary to protect the banks from carrying more than their share of the public burdens; that agencies of the Federal government are exempt from State legislation only so far as that legislation impairs their efficiency in performing the functions of their agency. Union Pacific R. Co. v. Peniston, 18 Wall. 5; 21 L. Ed. 787; State of New York v. Weaver, 100 U. S. 539; 25 L. Ed. 705; First National Bank v. Kentucky, 9 Wall. 353; 19 L. Ed. 701; Western Union Telegraph Co. v. Attorney General, 125 U. S., 530; 31 L. Ed. 790. In the case of an ordinary loan the property transferred to the borrower and the debt accruing to the lender are considered distinct and separate interests, and the State can impose a tax upon each. People v. Worthington, 21 Ill. 171; 74 Am. Dec. 86; See Tennessee v. Whitworth, 117 U. S. 129; 29 L. Ed. 830. The failure to tax one would have no bearing upon the right to tax the other. It would seem from this that a borrowing bank can be protected from taxation by the doctrine of Federal supremacy, without impairing the right of the State to tax its creditor. So we conclude that there is nothing in the relation of the bank

to the Federal government that protects the depositors from taxation.

But the defendant insists that if the tax is against the de-
67 positors instead of upon the property or business of the bank it is invalid for want of a legal assessment. The word "assessment" ordinarily implies an official listing of the persons and property to be taxed, and a valuation of the property of each person as a basis of apportionment. This is usually done by officials specially appointed for the purpose. But in the case of taxes laid upon solvent securities, certificates of deposit, mortgages, undivided profits, or the like, the nominal or face value of which is identical with the actual value, the assessment may be made by the Legislature without the intervention of assessing officers. 27 Ency. Law 663. Thus under an act of Congress which imposed a tax of five per cent on the declared dividends, undistributed earnings, and interest paid on the mortgage bonds, of certain corporations, and made provision for the making of certain returns by the corporation, it was held that no other assessment than that made by the statute was necessary to determine the extent of the liability; that when the facts were established the law made the assessment independent of the action of any officer; and that in a suit to recover the tax the controlling question was not what had been assessed, but what was due by law. Dollar Savings Bank v. United States, 19 Wall. 227; 22 L. Ed. 80; King v. United States, 99 U. S. 229; 25 L. Ed. 373; United States v. Erie Railway Co. 107 U. S. 1; 27 L. Ed. 385; United States v.
68 Philadelphia & Reading R. R. Co. 123 U. S. 113; 31 L. Ed. 138. It is evident from these cases that there are some classes of property as to which a legislative assessment is sufficient without a special official valuation.

But the defendant says that sections 804 to 808 in fact provide for a further assessment, and that the things required have not been done, and that consequently no assessment has been made. But the only thing we are concerned with at this stage of our inquiry is whether the statute is a sufficient provision for the making of a lawful assessment. A fair statement of the question would seem to be this: If a resident depositor had made the required returns to the commissioner and the listers, and the listers had made their returns to the commissioner, could the depositor have avoided payment of the tax on the ground that no official judgment had been passed on the value of his deposit? It is obvious that the only possible question affecting valuation would be one as to the solvency of the bank. In the taxation of cash there is no distinction between actual value and face value. A credit of a certain amount payable on demand in cash values itself, if the payer is solvent. Under a general law the value of all income-bearing securities for taxing purposes is determined by their amount. A taxpayer cannot reduce his list by valuing his invested funds according to the rate of interest they bear. This statute relates solely to interest bearing deposits, and income producing funds are presumable good. Certainly a National
69 bank open for business and paying interest regularly on its deposits may be presumed to be a solvent debtor. A taxpayer holding a note on which interest is regularly paid cannot properly

return it as due from an insolvent debtor on the ground that the debtor's financial condition is not such as to place him beyond the reach of disaster. No more can a depositor in a bank object to an assessment of his credit at its full amount because of the possibility that the bank may prove to be insolvent. In view of these considerations we think the assessment provided by the statute is not invalid because of the failure to provide for an official valuation.

In reaching this conclusion we are not unmindful of the decision in Com. v. Lehigh Valley R. R. Co. 104 Pa. St. 89,—a case specially relied upon by the defendant. In that case the statute imposed a tax on the value of corporate bonds held by residents of the State, to be paid into the state treasury by the corporation, and provided that the corporation should report to the auditor-general the amount of such indebtedness, and that the auditor-general should thereupon file an account of the amount due. The State claimed that this proceeding was a sufficient assessment, but the court considered that the tax was upon the actual value instead of the nominal or par value, and that a legal ascertainment of that value was essential to
70 the assessment of a valid tax; and considered further that upon no principle of law could the corporation's return of the amount of its indebtedness be held an assessment binding on its creditors. There the sum returned was the amount of the bonded debt, while the tax was on the actual value of the bonds; and the taxpayer had no part in the procedure by which the amount was determined, but was taxed on the basis of a return made by his debtor. Here the tax is upon the amount of the credit, and is based on a return of it made by the taxpayer himself.

The defendant claims further that the imposition of the tax is invalid because the statute conflicts in several respects with the provision of the Federal constitution which secures to all the equal protection of the laws. Some of its points are presented in connection with a review of Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232; 33 L. Ed. 892, which aims to distinguish that case from the one under consideration; and this makes a statement of the case desirable at this point. The statute of Pennsylvania imposed a tax of three mills on the dollar of the nominal or par value of bonds and other securities issued by corporations, and a like tax on the actual value of all other moneyed securities. The treasurer of a corporation was required to make a return of its loans, and on his
failure to do so an account against the corporation, charging
71 it with the tax supposed to be due, was filed by the auditor-general. If this account was approved by the state treasurer, it was served on the corporation, which then became liable to pay the tax within a specified time unless cause was shown to the contrary. If dissatisfied with the auditor's account, the corporation, with all others interested, could take the case into court for trial. It appeared on appeal that the nominal or face value of the company's bonds varied from the market value on account of the different rates of interest.

It was objected that the tax was illegal because the nominal value of the bonds was not their real value; because the owners of the

bonds had no notice, and no opportunity to be heard; because the company was taxed for property it did not own; and because all other property in the State was taxed at its actual value and on notice to the owners. The Court held that the making of the assessment upon the nominal or face value of the bonds instead of upon their actual value was not a violation of the Fourteenth Amendment. As regards the want of notice to the owners of the bonds the Court said: "What notice could they have which the law does not give them? They know that their bonds are to be assessed at their face value, and that a tax of three mills on the dollar of that value will be imposed; and that they will only be required to pay this tax when and as they receive the interest. If the State
72 may assess the tax upon the face value of the bonds, notice in pais is not necessary." Regarding the claim that the corporation was taxed for property it did not own, the Court said: "The objection is not true in point of fact. The corporation, as the debtor of its bondholders, holding money in its hands for their use, namely, the interest to be paid, is merely required to pay to the Commonwealth out of this fund the proper tax due on the security. The tax is on the bondholder, not on the corporation. This plan is adopted as a matter of convenience, and as a secure method of collecting the tax."

The defendant claims that the Bell's Gap case, while seemingly an authority for the State, is in fact an authority against it, and specifies a number of particulars in which the cases are considered distinguishable. Some of the points made are based upon the theory that the tax is upon the deposit as such, and our holding to the contrary makes a consideration of these unnecessary. It is said that the tax in that case was upon the nominal instead of the actual value, and so required nothing more than the return of the treasurer to complete the assessment, while here the tax is upon the actual value, the determination of which requires an official assessment, and that because of this difference notice in pais was unnecessary in that case, but essential in this. These matters are sufficiently covered by what has been said on the subject of valuation. Other arguments made in connection with the case will come within
73 the further discussion.

It is said that the act in question discriminates against depositors in National banks by singling them out from all other taxpayers, and requiring them to pay a State tax upon a certain class of debts due them; that this tax is at a different rate, and required to be paid at different times and by different methods from what is required of other taxpayers, and of them as to their other property; that they alone of all taxpayers are required to make returns disclosing the banks where they have deposits and the amount of their deposits; and that the act discriminates against depositors in National banks whose deposits are not on interest in that it leaves them subject to taxation at the full local rate. We think the act is valid as against these objections. The Federal constitution does not confine the State to one system of taxation, and different systems require different methods to adjust them to the general purpose of

the law. Michigan Central R. R. Co. v. Powers, 201 U. S. 245; 50 L. Ed 744; Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232; 33 L. Ed. 892. Diversity of taxation, both with respect to the amount imposed and the species of property selected for taxation or exemption, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of the terms. Pacific Express Co. v. Seibert, 142 U. S. 339; 35 L. Ed. 1035. Different systems, adjusted with reference to the valuation of different
74 kinds of property, may be adopted; and the method of collection may be varied to suit the necessities of the case. Tappan v. Merchants National Bank, 19 Wall. 490; 22 L. Ed. 189. Equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relation. Magoun v. Illinois etc. Bank, 170 U. S. 283; 42 L. Ed. 1037.

It is said that the effect of the act is to withdraw from local taxation personal property of great value, and that this results in a discrimination against tax payers having choses in action other than National bank deposits, by diminishing the grand list and thus raising the rate of local taxation, the average of which is already more than seven-tenths of one per cent per annum. This is clearly within the power of the State, unless prohibited by its own constitution. There is nothing in the Federal constitution which requires that State taxation be equal, uniform or just. Davidson v. New Orleans, 96 U. S. 97; 24 L. Ed. 616; Memphis Gas Light Co. v. Taxing District, 109 U. S. 398; 27 L. Ed. 976; Home Ins. Co. v. New York, 134 U. S. 594; 33 L. Ed. 1025; Giozza v. Tiernan, 148 U. S. 657; 37 L. Ed. 599. It is said in Merchants etc. Bank v. Pennsylvania, 167 U. S. 461; 42 L. Ed. 236, and again in Travelers Ins. Co. v. Connecticut, 185 U. S. 364; 46 L. Ed. 949; that the
"whole argument of a right under the Federal constitution
75 to challenge a tax law on the ground of inequality in the burdens resulting from the operation of the law is put at rest by the decision in Bell's Gap R. R. Co. v. Pennsylvania."

It is claimed further that the act discriminates between depositors in National banks and taxpayers under the general law by excluding the former from the privilege of deducting their indebtedness; and that it discriminates against National banks in that all their deposits bearing interest exceeding two per cent are taxed to the depositors, while of deposits in savings institutions only the amount exceeding $2,000 is so taxed. All that is required by the Federal constitution is that one class be not deprived of a privilege enjoyed by the other under the same conditions. Soon Hing v. Crowley, 113 U. S. 703; 28 L. Ed. 1145. Depositors in National banks and taxpayers under the general law are not in the same situation. One class pays a single tax to the State at a fixed rate which calls for an amount less than the average of taxes under the general law, while the other class is subject to the greater burden and uncertain demands of local taxation. Those more heavily taxed on an average under the general law may well be allowed a reduction denied to those who take advantage of the opportunity afforded by the special act. Nor do we think the discrimination between the two classes of

banks as regards the $2,000 limit is without reasonable
76 ground. National banks and savings institutions differ in
their purpose, in the scope of their business, and in the modes of operation permitted to them. The savings institution is primarily intended to encourage saving by people of small means, and a deposit in any one bank to the amount of $2,000 is exempt to the depositor. But this exemption is only partial. The $2000 goes to enhance the average amount of deposits on which the savings bank pays a tax to the State. A taxpayer can secure exemption from general taxation for an unlimited amount by placing it in any National bank, and the bank will pay no tax on the deposit however large. The fact that the State cannot require it to do so does not deprive the distinction of its legal effect.

It is well understood that a provision not objectionable on its face may be adjudged unconstitutional because of its effect in operation, and that in some cases the intent of the Legislature will be considered in determining the question. Yick Wo v. Hopkins, 118 U. S. 356; 30 L. Ed. 220; Dobbins v. Los Angeles, 195 U. S. 223; 49 L. Ed. 169. Among the cases cited by the defendant in discussing the question of unlawful discrimination is Larabee v. Dolley, 175 Fed. 365. This case arose under a statute which provided for the formation of a depositors' guaranty fund by assessments received from the banks, and gave National banks the option, upon certain
conditions, of becoming participants in the assessments and
77 benefits of the fund. It was held that it was beyond the
power of National banks to comply with the conditions, and that upon the case presented the formation of such a fund for the benefit of depositors in State banks would create an unjust and unreasonable discrimination against National banks. In this case it was alleged by the complainants and admitted by demurrer that the act was intended to deprive National banks of their customers and business, and that this was the effect of the act in operation. Here there is no finding of any such intent or effect. On the contrary, the case affords indications that National banks are benefited by the act.

The unconstitutionality of the statute is claimed on a further ground. It is said that the statute takes the property of the depositor without due process of law, in that it assesses without notice and gives him the opportunity to defend against the tax. Property may be taken through tax proceedings without the notice required in exercising the right of eminent domain. Hagar v. Reclamation District, 111 U. S. 701; 28 L. Ed. 569; Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232; 33 L. Ed. 892. The proceeding is within the requirement of due process if the taxpayer has an opportunity to contest the validity or amount of the tax in proceedings had for its collection. Winona etc. Co. v. Minnesota, 159 U. S.
526; 40 L. Ed. 247. We think the provisions of our statute
78 satisfy the requirement. The taxpayer's return will show a
deposit credit or a given amount. The law assesses a tax of seven-twentieths of one per cent on the sum returned. A mathematical calculation determines the amount of the tax The method

of enforcing collection is by a suit in court. The proceeding requires notice, and implies a right to contest the validity of the claim. See Lent v. Tillson, 140 U. S. 316; 35 L. Ed. 419; Cincinnati etc. R. R. Co. v. Kentucky, 115 U. S. 321; 29 L. Ed. 414. Statutes sometimes and perhaps generally provide in terms for the making of defences; but, as said in the case last cited, "in the absence of such provisions, and as a principle of general jurisprudence, it is safe to say that any defence is admissible which establishes the illegality of the proceeding resulting in the alleged assessment, whether because it is in violation of the local law which is relied on as conferring the authority * * * or because it constitutes a denial of a right secured to the party complaining by the constitution of the United States."

It is said further that the operation of the statute is such that it takes the property of the bank and of its depositors and of its stockholders without due process. The operation complained of can occur only through the action of the bank, and the consideration of any effect the action of the bank may have on the rights of
79 the depositors belongs to a later branch of the discussion. The statute does not undertake to authorize a deduction from the credits on any other basis than a correct apportionment. If any loss falls upon the bank or its stockholders it is by virtue of the bank's undertaking, and any question that arises here, touches the matter of ultra vires, rather than the constitutionality of the statute.

It is claimed further that the statute is unconstitutional in that it impairs the vested rights of certain depositors under their contracts with the bank. It is said that the bank is under contract to pay one class of its depositors interest at the rate of three per cent per annum, and that the statute requires it to pay seven-tenths of one per cent to the State and permits it to pay two and three-tenths per cent to the depositor in satisfaction of its agreement. The unsoundness of this claim is apparent from several cases already cited. Speaking generally all property within the jurisdiction of the State is held subject to its right to impose new taxes, or to increase the rate or change the method of taxation. All contracts are made with reference to the taxing power of the State, and in subordination to it. Rutland R. R. Co. v. Central Vermont R. R. Co., 63 Vt., 120; Murray v. Charleston, 96 U. S. 432; 24 L. Ed. 760; Cleveland etc. R. R. Co. v. Pennsylvania, 15 Wall. 300; 21 L. Ed. 179;
80 Gilman v. Sheboygan, 67 U. S. 510; 17 L. Ed. 305; North Missouri R. R. Co. v. Maguire, 20 Wall. 46; 22 L. Ed. 287. To impair the obligation of a contract, the statute must act upon the contract itself. Charles River Bridge v. Warren Bridge, 11 Pet. 420, 578; 9 L. Ed. 773, 836. The statute under consideration acts upon the property which is the subject of the contract, and not upon the contract.

The defendant says further that the act is an unlawful interference with the business of National banks, because of the publicity required to be given to the business of the depositor and the bank by the prescribed returns. It is true that a State can exercise no

control over a National bank, nor in any way affect its operation, except as Congress may permit. Farmers etc. Bank v. Dearing, 91 U. S. 29; 23 L. Ed. 196; Hawley v. Hurd, 72 Vt. 122. But this doctrine protects the bank only from such legislation as tends to impair its utility as an instrumentality of the Federal government. Waite v. Dowley, 94 U. S. 527; 24 L. Ed. 181. It was held in that case that a statute of this State which required cashiers of National banks to transmit to town clerks a list of their shareholders, with the number of their shares, was not void. It is inconceivable that this requirement of returns from depositors for the purpose of reaching credits properly taxable to them, can in — way
81 impair the efficiency of a National bank as an agent of the Federal government.

It is said that the statute is invalid because in conflict with the provision of the State constitution which requires from every member of society a proportional contribution towards the expenses of government. It was held in Re Hickok's Est., 78 Vt. 259, upon an examination of this provision, that an inheritance tax is not unconstitutional. The Court considered that the clause requires "that the expenses of government shall be apportioned equally, and not merely that exactions levied upon property shall be equal," but nevertheless concluded that the "requirement of proportional contributions for the support of the government was not intended to restrict the State to methods of taxation that operate equally upon all its inhabitants, regardless of the variety and measure of the advantages derived from its protection and regulation." We think the decision of that case upon the reasoning indicated sustains the constitutionality of the special statute under consideration.

This completes our consideration of the objections urged against the first division of the statute; and we conclude that the provision made for taxing the depositors is valid, and that the State's
82 waiver of all proceedings under it afforded a sufficient consideration for the defendant's stipulation.

It is said, however, that if the amount called for by this stipulation is collected, and the bank undertakes to recoup itself from the deposits, the property of the depositor will be taken without due process of law because no assessment has been made against him. But the assessment provided for has not been made because of the stipulation, and if the amount of the tax is collected it will be on the defendant's undertaking, and not by way of enforcing the tax. If an assessment had been actually made, the right of the State to make the bank its agent to collect the tax would have been undoubted. First National Bank v. Kentucky, 9 Wall. 353; 19 L. Ed. 701; Lionberger v. Rowse, 9 Wall. 468; 19 L. Ed. 721; Merchants etc. Bank v. Pennsylvania, 167 U. S. 461; 42 L. Ed. 236.

This brings us to the consideration of the second branch of the statute and of the stipulation executed under its provisions. We take up the question of ultra vires independent of the question regarding non-residents, leaving that for later consideration. The agreement is in substance that the bank will make, on or before April thirtieth, sworn returns showing the average amount of de-

posits of the class named during the six months beginning
83 with the first day of the previous October, and that on or before such thirtieth day of April, it will pay a tax of seven-twentieths of one per cent on said average of deposits. The use of the term "a tax" cannot be given an effect adverse to the State's claim, for the agreement proceeds to say that it is made for the purpose of carrying out the statutory provisions which relieve the depositors from making the returns and paying the tax. A National bank has such powers as are properly incident to the carrying on of the business which it is expressly authorized to undertake. First National Bank v. National Exchange Bank, 92 U. S. 90; 23 L. Ed. 678; Western National Bank v. Armstrong, 152 U. S. 346; 38 L. Ed. 470. A National bank is authorized to receive deposits,—in other words, to assume the relation of a debtor; and if its obligation to the depositor is a credit than can be taxed by the State the convenient and successful carrying on of its business as a bank of deposit would seem to justify the adoption of some method by which the bank can act for its depositors. If this is so, there is nothing on the face of the stipulation to show that the undertaking is ultra vires,—nothing independent of the operation of the agreement as shown by the facts stated. If the duty of payment related to a tax on the shares, and was imposed instead of assumed, the case would be quite within the decisions of the Federal Court. The objections arise in connection with the method adopted for determining the amount of the payment.

84 It appears from the facts stated that because of a constant fluctuation in the amount of the deposits, and the effect of the rules for allowing and crediting interest, the relation of an individual depositor to the total amount of deposits at any date, and to the average of deposits for any period, is constantly changing; and that it is impossible for the bank to determine at the time of making its returns on what deposits it will pay or allow interest for the semi-annual period for which it is to pay the tax.

The defendant argues that the sum stipulated to be paid is a different sum and a different thing from the tax provided for, in that the tax assessed by the statute is upon the amount of the individual deposit held on the first day of April and October, while the tax which the bank undertakes to pay is on the average amount of its deposits for the six months preceding; that it cannot be said that the State makes the bank its agent to collect the tax assessed by the statute, for the bank does not undertake to pay the tax assessed, but a substitute for that tax; that in agreeing to do this the bank undertakes to pay on sums on which it receives no interest, on sums not in the bank at the date of the assessment against the depositor, and on sums withdrawn before a return is required of it; that the situation is such that the bank will either pay
85 a larger sum to the State than could be collected of the depositors, or the State will receive less than it would receive if payment were made by the depositors; that in making the payment stipulated for, the exact proportion will not be taken from any deposit, and that consequently the money of some depositors

will be taken to complete the shares of others, or some of the money which the stockholders are entitled to by way of dividends will go for that purpose; that it is impossible for the bank to arrive at the precise amount which the statute entitles it to deduct from the depositor's account; that the bank has undertaken to pay more than it can recoup, inasmuch as the average of deposits includes deposits that were withdrawn before the amount became due under the stipulation; and that in these circumstances the tax becomes a tax on the bank itself, and therefore invalid.

The defendant illustrates these claims by the figures given for the six months covered by the stipulation in suit. The amount of the deposits October 1, 1908, was $569,393.75, of which $20,726.28 were withdrawn prior to April 1, 1909. Of deposits made after October 1, 1908, $7,069.24 were withdrawn before April 1, 1909, and $74,575.28 were in the bank on that day. The amount in the bank April 1, 1909, was $623,242.75. The average of de-
86 posits for the period was $578,669.19, seven-twentieths of one per cent of which is $2,025.33. It is said that the bank could not under any circumstances retain more than seven-twentieths of one per cent of any deposit; that it could not reimburse itself by deducting anything from the deposits made after October 1, 1908, because the tax against the depositor is assessed on the amount he has in the bank on that day, and that it could not reimburse itself from the deposits in the bank October 1 which were withdrawn prior to April 1, because they would be beyond the bank's control; that seven-twentieths of one per cent on the amount in the bank October 1, 1908, is $32.45 less than the amount called for by the stipulation, and that the percentage on the amount included in the total of October 1, 1908, which was withdrawn before April 1 is $72.19, making a total of $104.64 to be satisfied from the resources of the bank.

The defendant's brief proceeds upon the theory, advanced at various stages of the argument, that the sections which lay a tax upon the individual depositors were never intended to become operative, but are merely a device through which the State seeks to tax indirectly a class of banks which it cannot tax directly; that the situation in which the statute places National banks with
87 reference to their depositors and other banks is such that they are compelled to avail themselves of the privilege of paying the taxes of their depositors in order to save their business; that the right conferred by the statute to deduct the taxes "from the interest or deposits then or thereafter held by it belonging to the person from whom the tax became due" is of no value, because it cannot determine the exact amount chargeable to a particular deposit and has no right to deduct more than the exact amount; and that a payment which is to be arrived at by taking an average of the deposits for the tax period, and which cannot be apportioned to the individual depositors, is in essence and effect a tax upon the business of the bank.

It is easily conceivable that the provisions laying a tax on the depositors were framed and enacted in the full expectation that the

payment of the tax would be otherwise provided for. The fact, if it be a fact, has no bearing on the validity of the tax or the power of the corporation regarding it. In considering the claim made as to the coercive effect of the statute, regard must be had to the conditions which existed before the statute was enacted, and which would exist now without the statute. The State has had for many years a system by which deposits in savings banks, savings institutions and trust companies are taxed against the corporation and the depositors relieved from taxation on their deposits to a cer-
88 tain amount, while other claims against solvent debtors, including deposits in banks other than those above enumerated, are subject to general taxation. It seems probable that the interest of the State to encourage and facilitate the appearance in larger volume of a class of property that easily escapes taxation, and a desire on the part of National banks to share in the benefits accruing to the State savings institutions from the operation of this special law, combined to produce the legislation in question. If an apportionment of the stipulated sum among the individual depositors was required, the defendant's argument upon the subject of apportionment would be important, for the depositors have not consented to an apportionment, and there is no principle of taxation by which the property of one person, even of a trifling amount, can be taken to apply on the tax of another. But no deduction under the statutory permission has been made or attempted, and the depositors are not the party complaining. The fluctuations attending the business of carrying deposits, the problems that would be presented by an attempt at apportionment, and the probable inability to recoup the full amount called for by the stipulation, are not matters which have been discovered by experimenting with the law, but matters which were well known to the bank before the stipulation
89 was filed. Much of the defendant's argument is based upon the assumption that the credits of the depositors are to be reduced by their respective shares of the sum paid. It appears from the agreed statement that during the period covered by the stipulation, and prior thereto, the bank has published advertisements urging taxpayers to take advantage of this law, stating that the bank paid four per cent on savings accounts to any amount, and all taxes; and assuring its patrons that their names were not disclosed, as payment was made on the average of deposits. It is clear from what has been said that the action of the defendant was freely and understandingly taken, without any expectation of deducting the amount paid from the sums due depositors, and therefore unaffected by the conditions attending the making of an apportionment, whatever they may be. The agreement evidently arose from the bank's ability and willingness to pay the current rate of interest on savings deposits, and also the taxes of the depositors as represented by the proposed average. It may well be supposed that if the defendant had been looking to a recoupment, and had considered a recoupment impracticable, it would not have entered into the stipulation. If banks of this class had failed to avail themselves of the option their situation would have been the same as before. No changes were

made in other features of the tax law to operate as a pressure upon National banks in determining their course.

90 The view we have taken renders it unnecessary to give special consideration to New Orleans v. Houston, 119 U. S. 265; 30 L. Ed. 411, a case relied upon by the defendant. That case might have some bearing here if the statute itself made the defendant primarily liable for the taxes assessed against its depositors. Any chance the defendant has of paying at a loss results from its own agreement, and not from the taxing provisions of the statute.

The discussion has now reached a point where it will be safe to dismiss the theory of the defendant, running through all its argument, that the payment contemplated by the agreement is in reality the tax itself, and that the validity of the agreement depends upon the payment being the exact sum of the individual taxes. The stipulation is in fact an agreement to pay an amount in lieu of the taxes, to be determined by a practicable method convenient to the bank, which will not be the exact amount of the tax for any semi-annual period, and which may favor either the bank or the State in a given instance, but which, as the business runs and on the average, will be substantially the amount required of the taxpayers. This narrows our inquiry to the question whether the variations and contingencies incident to the method adopted are such as place the undertaking beyond the power of the corporation. The figures before given show the result of the method in the present case;

91 but the smallness of the deficiency which falls on the bank in this instance must not be taken as a measure of the risk assumed by such a stipulation. It is conceivable that something might occur to cause the withdrawal of a large amount of the bank's deposits in a very short time. But the undertaking is assumed only for a six months' period, and the per cent called for is so small that in such an event as we have supposed the drain upon the resources of the bank could not be serious. It is at most but the taking of an ordinary business risk in connection with a reasonable expectation of substantial gains. The question is whether an agreement of this nature is properly incident to the authorized business of the bank.

A corporation has no other powers than those conferred upon it by the sovereignty which creates it. The enumeration of certain powers implies the exclusion of all others not fairly incidental to those enumerated. Central Transportation Co. v. Pullman Palace Car Co., 139 U. S. 24; 35 L. Ed. 55. But whatever may fairly be regarded as incidental to the objects for which the corporation is created is not to be taken as prohibited. Green Bay etc. R. R. Co. v. Union Steamboat Co. 107 U. S. 98; 27 L. Ed. 413. A corporation can make no other contracts than those authorized by its charter. Bank of Augusta v. Earle, 13 Pet. 519; 10 L. Ed. 274. But an undertaking which may fairly be regarded as incidental to, or

92 consequent upon, those things which the Legislature has authorized, ought not, unless expressly prohibited, to be held ultra vires. Jacksonville etc. Co. v. Hooper, 160 U. S. 514; 40 L. Ed. 515. Congress has conferred upon National banks, acting through a board of directors, all such incidental powers as are necessary to

carry on the business of banking . . . among other things, receiving deposits; and these powers are such as are required to meet all the legitimate demands of the authorized business, and this necessarily implies the right of a bank to incur liabilities in the regular course of its business. First National Bank v. National Exchange Bank, 92 U. S. 122; 23 L. Ed. 679. These general statements must be our guide in determining whether the defendant had the power to enter into this agreement.

It is clear that the bank's agreement is not foreign to the purpose of its creation. It is a contract designed to promote the interests of the corporation in an authorized branch of its business. It is calculated to subserve the convenience of a class of depositors whose patronage is desirable, by relieving them from personal attention to the matters of return and payment. The mere fact that this is done in co-operation with the State, and under a system provided by its statutes, does not determine that the act is ultra vires. We
93 cannot see that the bank's undertaking involves it in any relations with the State that are inconsistent with its position as a creation and instrumentality of the Federal government. There is nothing in the obligation assumed that amounts to a substantial burden, or subjects the resources of the bank to any considerable risk.

In this connection a further and fuller reference may be had to Larabee v. Dolley, before cited. That case was a bill in equity, brought to test the validity of a Kansas statute which provided for the creation of a "bank depositors guaranty fund" to be raised by an assessment on the banks taking advantage of the act. One section of the act provided that any National bank might at its option participate in the assessments and benefits of the fund upon the terms and conditions applicable to State banks. But a bank could not avail itself of this option without submitting to an examination of its affairs by the state bank commissioner, making a showing to his satisfaction, and paying the expense of the examination. It will be seen also that a National bank, in taking the benefit of this act, subjected itself to assessment to create and maintain a state institution, in which state and National banks were to have a common interest, but which was to be under state control. It might well be said in this case, as was said, that National banks were precluded by the very law of their creation from accepting the terms, conditions and
94 obligations of the act; and that it must be conclusively presumed that the legislature knew when it passed the act that the banks could not accept the conditions, obligations or benefits of the act, or be bound thereby. In the case before us nothing whatever is required of the bank in connection with the exercise of its option. The return which the defendant speaks of as a visitorial requirement is not preliminary to the exercise of the option, but preliminary to the payment. There is nothing in the nature of the agreement which brings the bank making it into association with State institutions, or places any of its interests in the keeping of a State official. In view of the considerations mentioned we think it was within the power of the corporation to execute a stipulation of this

character. This brings us to the consideration of the point before reserved—the construction and effect of the statute as regards non-residents.

We have seen that the property of the depositor is not in the money deposited, but in the credit given for it. Intangible personal property has no independent situs, but follows that of its owner, and can be taxed only where the owner resides. The debts of a corporation, like those of an individual, are the property of its creditors, and can have no locality separate from the persons to whom they are due. Cleveland etc. R. R. Co. v. Pennsylvania, 15 Wall. 300;
95 21 L. Ed. 179; see St. Albans v. National Car Co., 57 Vt. 68. So far as these credits are the property of non-residents, they are without jurisdiction of the State and beyond its taxing power; and if the statute must be held to include non-residents it is unconstitutional, at least in part.

When the constitutionality of a statute is questioned, it is the duty of the court to adopt a construction that will bring it into harmony with the constitution, if its language will permit. General words are not to be so construed as to give the statute an effect beyond the legislative power, and thereby render it unconstitutional. When the terms of a statute are broad enough to include retrospective acts as well as prospective, and as applied to retrospective acts the statute would be unconstitutional, the court will apply it to the prospective acts only. Newland v. Marsh, 19 Ill. 376. When a statute is broad enough to cover matters without the State as well as within, and as applied to matters without the State, it would be unconstitutional, the court will restrict the application to matters within the State.—unless the statute clearly indicates a different intent. State v. Peet, 80 Vt. 449. When a statute is susceptible to two constructions, one of which supports the act and gives it effect, and the other renders it unconstitutional and void, the former will be adopted, even
96 though the latter may be the more natural interpretation of the language used. 26 Ency. Law 640; Freight Discrimination Cases, 95 N. C. 428; 59 Am. Rep. 247. A statute is never to be construed so as to be unconstitutional, if a reasonable construction can be placed upon it which will give to its provisions a constitutional effect. Ives v. Salisbury, 56 Vt. 565. If there is a construction which will bring the statute into harmony with the constitution without doing violence to the fair meaning of the words used, it is the duty of the court to adopt it. Grenada County v. Brown, 112 U. S. 261; 28 L. Ed. 704. A statute must, if possible, be given a construction which will make it consistent with the constitution. Presser v. Illinois, 116 U. S. 252; 29 L. Ed. 615. The provisions of a revenue act, especially, ought not to be lightly or inadvertently set aside. Nicol v. Ames, 173 U. S. 509; 43 L. Ed. 786. Every presumption is to be made in favor of the constitutionality of the statute, and it is not to be adjudged unconstitutional without clear irrefragable evidence that it infringes the paramount law. In re Hackett, 53 Vt. 354. the presumption of validity continues until the contrary is shown beyond a rational doubt. Union Pacific R. R. Co. v. United States, 99 U. S. 700; 25 L. Ed. 496. As was said by Chief Justice Shaw in

Wellington v. Petitioners, 16 Pick. 87; 26 Am. Dec. 631;
97 "Courts will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt."

A majority of the Court think the statute should be construed as applying to resident depositors only. The statute nowhere in terms imposes a tax on non-resident depositors. The general rule requires that the phrase "every person," used in section 804, be construed as applying only to persons on whom the law may operate, unless there is something in the statute that compels a different construction. Section 808, which provides for the preservation of the reports for three years, and for their inspection by the State's Attorney of the county where the depositor has his domicile if a resident of this State, does not necessarily imply a division of the depositors into two classes; for the provision relates to a period sufficiently prolonged to cover many changes of residence, and may properly be construed to mean "if the depositor continues to be domiciled in this State." The reference in section 809 to the reports provided for in section 805 tends to fortify the conclusion that the words "every person" in
98 809 mean the same as the words "every resident of this State" used in 805. The provision in section 810 that no other tax shall be assessed against the depositors on account of such deposits, seems somewhat inconsistent with the theory that the Legislature had in contemplation persons other than residents of this State. The provision of section 811 which imposes a penalty on delinquent depositors would hardly have been included in a system designed to operate on non-residents. In view of these considerations we construe the statute to apply to resident depositors, only.

The defendant's agreement, although in terms an agreement to pay seven-twentieths of one per cent on the average amount of all the deposits, is declared to have been entered into for the purpose of carrying out the provisions of the statute and thereby relieving its depositors from the tax imposed upon them, and the scope of its undertaking is to be measured by the extent of the taxation as now determined. So the amount of the judgment will be arrived at by a computation based on the credits of resident depositors. The agreed statement provides that the required amount for the semi-annual period ending September 30, 1909, shall be included in the judgment.

99 Judgment reversed and judgment for the plaintiff for $3989.85.

MUNSON, *J.*, thinks the statute plainly expresses an intention to tax all the deposits regardless of the residence of the depositors, and so does not concur in the disposition made of the question last considered.

STATE OF VERMONT:

I certify that the foregoing is a true copy of the opinion of the Supreme Court of the State of Vermont in the case of State of Vermont v. Clement National Bank.

(Signed) LOVELAND MUNSON,
Judge of the Supreme Court.

Filed in clerk's office, March 15, 1911.
(Signed) H. A. HARMAN, *Clerk.*

100 And afterwards, and on the 15th day of March, A. D. 1911, the defendant filed its petition for a writ of error and supersedeas, with prayer for reversal, to the Supreme Court of the United States, which said petition is in the words and figures following:

101 STATE OF VERMONT,
Supreme Court:

STATE OF VERMONT
vs.
THE CLEMENT NATIONAL BANK.

Petition for Writ of Error.

The Clement National Bank, defendant in the above entitled cause, feeling itself aggrieved by the judgment of the Supreme Court of the State of Vermont, entered on the 16th day of January, 1911, comes now by Maxwell Evarts, Esq., and Marvelle C. Webber, Esq., its attorneys, and petitions said Court for an order allowing said defendant to procure a writ of error to the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided, for the Correction of the errors complained of as more specifically set forth in the assignment of errors, and also that an order be made fixing the amount of security which the said defendant shall give and furnish upon said writ of error, and that upon the giving of such security all other
102 proceedings in this Court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

And your petitioner will ever pray.

THE CLEMENT NATIONAL BANK,
By MARVELLE C. WEBBER
MAXWELL EVARTS, *Its Attorneys.*

(Endorsed:) Filed March 15, 1911. H. A. Harman, Clerk of the Supreme Court.

103 And on the same 15th day of March, A. D. 1911, an order was entered allowing a writ of error to the Supreme Court of the United States and staying the judgment; which said order

was allowed by the Chief Judge of the Supreme Court of Vermont, and is in the words and figures following:

104 STATE OF VERMONT,
Supreme Court:

STATE OF VERMONT
vs.
THE CLEMENT NATIONAL BANK.

Order Allowing Writ of Error.

Upon motion of Maxwell Evarts, Esq., and Marvelle C. Webber, Esq., Attorneys for defendant, and upon filing a petition for a writ of error and an assignment of errors, it is ordered that the writ of error be and hereby is allowed to have reviewed in the Supreme Court of the United States the judgment heretofore entered herein on the 16th day of January, 1911, and that the amount of bond on said writ be and hereby is fixed at $8000.00 and the bond presented is hereby approved, and the judgment rendered herein is hereby stayed until final determination of said writ of error

Dated at Randolph, Vermont, this 11th day of March, 1911.

JOHN W. ROWELL,
Chief Judge of the Supreme Court of Vermont.

(Endorsed:) Filed March 15, 1911. H. A. Harman, Clerk of the Supreme Court.

105 And on the same 15th day of March, A. D. 1911, the defendant filed its supersedeas bond approved by the Chief Judge of the Supreme Court, and its assignment of errors; which said bond and assignment of errors are in the words and figures following:

106 STATE OF VERMONT,
Supreme Court:

STATE OF VERMONT
vs.
THE CLEMENT NATIONAL BANK.

Supersedeas Bond.

Know all Men by These Presents, That we, the Clement National Bank of the City of Rutland, in the County of Rutland and State of Vermont, as principal, and Percival W. Clement of City of Rutland in the County of Rutland and State of Vermont, as surety, are held and firmly bound unto the State of Vermont in the full and just sum of Eight Thousand dollars, to be paid to the State of Vermont, to which payment well and truly to be made we bind ourselves,

our successors, heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of March, A. D. 1911.

Whereas, lately at a general term of the Supreme Court of the State of Vermont, in a suit pending in said Court, between the State of Vermont, as aforesaid, plaintiff, and the said The
107 Clement National Bank, defendant, judgment was rendered against the said The Clement National Bank and the said The Clement National Bank having prayed for and been allowed a writ of error to reverse the judgment in the aforesaid suit, and a citation having been issued directed to the said State of Vermont citing and admonishing it to be and appear in the Supreme Court of the United States in the City of Washington within thirty days from the date thereof.

Now, Therefore, the condition of the above obligation is such, that if said the Clement National Bank shall prosecute its writ of error to effect and answer all damages and costs, if it fails to make its plea good, then this obligation shall be void, otherwise the same shall remain in full force and virtue.

[SEAL.] CLEMENT NAT. BANK,
By WALLACE C. CLEMENT, *Pres.*
PERCIVAL W. CLEMENT, [SEAL.]
Surety.

Signed, and sealed in the presence of
M. C. WEBBER.
ROBERT CLEMENT.

Bond approved this 11th day of March, 1911, and citation issued.
JOHN W. ROWELL,
Chief Judge of the Supreme Court of Vermont.

(Endorsed:) Filed March 15, 1911. H. A. Harman, Clerk Supreme Court.

108 STATE OF VERMONT,
Supreme Court:

STATE OF VERMONT, Plaintiff,
vs.
THE CLEMENT NATIONAL BANK, Defendant.

Assignment of Errors.

Comes now The Clement National Bank, defendant in the above entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of its writ of error therein.

I.

The Supreme Court of the State of Vermont erred in allowing judgment for plaintiff.

II.

The Court erred in holding that on the material facts agreed upon the plaintiff was entitled to recover.

III.

The Court erred in not holding that Chapter 37 of the Public Statutes of the State of Vermont is unconstitutional on the ground that it undertakes to tax a Federal instrumentality and the
109 franchise of a National Bank, and undertakes to exercise over it visitorial powers and an unwarrantable interference with its rights, privileges, immunities and exemptions as a National Bank.

IV.

The Court erred in failing and refusing to reverse in all respects the judgment of the Rutland County Court.

V.

The Court erred in holding that there had been an actual legal assessment of the tax provided for by chapter 37 of the Public Statutes of the State of Vermont relating to National bank deposits.

VI.

The Court erred in holding that the assessment of the tax against the individual depositors in the Clement National Bank had been effected by the provisions of the said act and the action of the State officials thereunder.

VII.

The Court erred in failing and refusing to grant judgment to the defendant upon the agreed statement of facts.

VIII.

The Court erred in holding as follows: "The substitution of the bank for the depositor as the one responsible for the payment of the tax, was effected by its own act."

110 IX.

The Court erred in holding that the language of the Statute does not require the conclusion that by the terms of the Statute the tax is upon the deposits and therefore upon the property or business or franchises of the bank.

X.

The Court erred in concluding "that there is nothing in the relation of the bank, to the Federal Government that protects the depositors from taxation."

XI.

The Court erred in holding that the tax, considered as a tax against the depositors instead of a tax upon the business of the bank, was not invalid for want of a legal assessment.

XII.

The Court erred in holding that, "But the defendant says that sections 804 to 808 in fact provide for a further assessment, and that the things required have not been done and that consequently no assessment has been made. But the only thing that we are concerned with at this stage of our inquiry is whether the statute is a sufficient provision for the making of a lawful assessment. A fair test of the matter would seem to be this: If a resident de-
111 positor has made the required returns to the commissioner and the listers, and the listers have made their return to the commissioner, could the depositor have avoided payment of the tax on the ground that no official judgment has been passed upon the value of his deposit? It is obvious that the only question affecting valuation would be one as to the solvency of the bank. In the taxation of cash there is no distinction between actual value and face value. A credit of a certain amount payable on demand in cash values itself, if the payer is solvent. Under a general law the value of all income-bearing securities for taxing purposes is determined by their amount. A taxpayer cannot reduce his list by valuing his invested funds according to the rate of interest they bear. This statute relates solely to interest-bearing deposits, and interest-bearing deposits are presumably good. Certainly a National bank open for business and paying interest regularly on its deposits may be presumed to be a solvent debtor. A taxpayer holding a note on which interest is regularly paid cannot properly return it as due from an insolvent debtor on the ground that the debtor's financial condition is such as to place him beyond the reach of disaster. No more can a depositor in a bank object to an assessment of his
112 credit at its full amount because of the possibility that the bank may prove insolvent. In view of these considerations we think that the assessment provided by the statute is not invalid because of the failure to provide for an official valuation."

XIII.

The Court erred also in holding that the tax provided by the Statute is upon the amount of the credit, and is based on a return of it made by the taxpayer himself.

XIV.

The Court erred in holding that the assessment against the depositors was valid without notice to them and opportunity to be heard, and in failing to hold that this was taking property without due process of law and contrary to the Fourteenth Amendment to the Constitution of the United States.

XV.

The Court erred in holding that the Statute was valid as against the objections that it (1) discriminates against depositors in National banks by singling them out from all other taxpayers and requiring them to pay a State tax upon a certain class of debts due them, (2) that the tax is at a different rate, and required to be paid at different times and by different methods from what is required of other
113 taxpayers, and of them as to their other property; (3) that they, said depositors, alone of all taxpayers are required to make returns disclosing the banks where they have deposits and the amount of their deposits; (4) and that the act discriminates against depositors in National banks whose deposits are not on interest in that it leaves them subject to taxation at the full legal rate.

XVI.

The Court erred in holding that the act is valid and constitutional as against the objection that the effect of the act is to withdraw from local taxation personal property of great value, and that this results in a discrimination against taxpayers having choses in action other than National bank deposits, by diminishing the grand list and thus raising the rate of local taxation, the average of which is already more than seven-tenths of one per cent per annum.

XVII.

The Court erred in holding that the act in question is not illegal against the objections that (1) it discriminates between depositors in National banks and other taxpayers by excluding the former from the privilege of deducting their indebtedness; and (2) that it discriminates against National banks in that all their deposits bearing interest exceeding two per cent are subject to a State tax while of deposits in savings institutions only the amount exceeding two thousand dollars ($2000.) is taxed.

114 XVIII.

The Court erred in holding that the act in question is not invalid on the ground that it was intended to deprive National banks of their customers and business in order to force them to elect to pay the tax of the depositor or a sum in lieu thereof and in holding "that on the contrary the case affords indication that National banks are benefited by the act."

XIX.

The Court erred in holding that the Statute in question is not unconstitutional in that it takes property of the depositor without due process of law by assessing him without notice and giving him no opportunity to defend against the tax.

XX.

The Court erred in holding that the act was not invalid in that the operation of the statute was such that it takes the property of the bank and of its depositors and of its stockholders without due process of law.

XXI.

The Court erred in holding that the operation of the Statute complained of can come only through the action of the bank and that the statute does not undertake to authorize a deduction from
115 the credits upon any other basis than a correct apportionment; and further that if any loss falls upon the bank or its stockholders it is by virtue of the bank's undertaking.

XXII.

The Court erred in holding that the statute is not unconstitutional in that it impairs the vested rights of depositors having interest-bearing deposits under their contracts with the bank, the forms of which contracts are exhibits D and E, made a part of the agreed statement of facts, in that the bank is under contract to pay one class of its depositors interest at the rate of three per cent per annum and that the statute requires it to pay seven-tenths of one per cent to the State and permits it to pay two and three-tenths per cent to the depositor in satisfaction of its agreement.

XXIII.

The Court erred in holding that the act in question is not an unlawful interference with the business of National banks, and of the defendant bank, because of the publicity required to be given to the business of the depositors and of the bank by the prescribed returns.

XXIV.

The Court erred in holding that the act in question is not invalid because it conflicts with the provisions of the State Constitu-
116 tion, which requires from every members of society a proportional contribution toward the expenses of government.

XXV.

The Court erred in holding as follows: "This completes our consideration of the objections urged against the first division of the statute; and we conclude that the provision made for taxing the depositors is valid, and that the State's waiver of all proceedings under it afforded a sufficient consideration for the defendant's stipulation."

XXVI.

The Court erred in holding that "It is said, however, that if the amount called for by this stipulation is collected, and the bank undertakes to recoup itself from the deposits, the property of the de-

positor will be taken without due process of law because no asses
ment has been made against it. But the assessment provided f
has not been made because of the stipulation, and if the amount
the tax is collected it will be on the defendant's undertaking, a
not by way of enforcing the tax."

XXVII.

The Court erred in holding that the stipulation signed by t
defendant and made the basis of this suit was not ultra vires a
for that reason non-enforceable, and in holding that the stipulati
was within the power of the corporation to make.

117

XXVIII.

The Court erred in holding that the use of the term "a tax" co
tained in the stipulation cannot be given an effect adverse to t
State's claim.

XXIX.

The Court — in holding that there is nothing on the face
the stipulation to show that the undertaking is ultra vires,—not
ing independent of the operation of the agreement, as shown by t
facts stated, and that the objections upon this ground arise only i
connection with the method adopted for determining the amou
of the payment.

XXX.

The Court erred in holding that the act is not invalid on t
ground of ultra vires by reason of the method adopted for determi
ing the amount of the payment.

XXXI.

The Court erred in holding that the act is not invalid on t
grounds claimed that because of the constant fluctuation in t
amount of the deposits, and the effect of the rules of the bank f
allowing and crediting interest, the relation of an individual d
positor to the total amount of deposits at any date, and to the ave
age of deposits for any period, is constantly changing, and that
is impossible for the bank to determine at the time of making i
returns on what deposits will pay or allow interest for t
118 semi-annual period for which it is required to pay the tax.

XXXII.

The Court erred in holding that the act is not invalid as again
the objections: (1) that the sum stipulated to be paid is a differe
sum and a different thing from the tax provided for, in that the ta
assessed by the statute is upon the amount of the individual depos
held on the first day of April and October, while the tax which t
bank undertakes to pay is on the average amount of the deposits f
the six months preceding; (2) that it cannot be said that the sta

makes the bank its agent to collect the tax assessed by the statute, for the bank does not undertake to pay the tax assessed but a substitute for that tax; (3) that in doing this the bank undertakes to pay on sums on which it receives no interest, on sums not in the bank on the date of the assessment against the depositor, and on sums withdrawn before a return is required of it; (4) that the situation is such that the bank will either pay a larger sum to the state than would be collected of the depositors, or the State will receive less than it would receive if payment was made by the depositors; (5) that in making the payment stipulated for, the exact proportion will not be taken from any deposit, and that consequently the money of
119 some depositors will be taken to complete the shares of others, or some of the money which the stockholders are entitled to by way of dividends will go for that purpose; (6) that it is impossible for the bank to arrive at the precise amount which the statute entitles it to deduct from the depositor's account; (7) that the bank has undertaken to pay more than it can recoup, inasmuch as the average of the deposits include deposits that were withdrawn before the amount became due under the stipulation; (8) and that in these circumstances the tax becomes a tax upon the bank itself.

XXXIII.

The Court erred in holding that the act is valid as against the objections: (1) that the sections which lay a tax upon individual depositors were never intended to become operative, but are merely a device through which the state seeks to tax indirectly a class of banks which it cannot tax directly; (2) that the situation in which the statute places National banks with reference to their depositors and other banks is such that they are compelled to avail themselves of the privilege of paying the taxes of their depositors in order to save their business; (3) that the right conferred by the statute to deduct the taxes "from the interest on deposits then or thereafter held by it belonging to the person from whom the tax becomes due," is of no value, because it cannot determine the exact amount
120 chargeable to a particular deposit and has no right to deduct more than the exact amount; (4) and that a payment which is to be arrived at by taxing an average of the deposits for the tax period, and which cannot be apportioned to the individual depositors, is in essence and effect a tax upon the business of the bank.

XXXIV.

The Court erred in holding that the act in question is not coercive upon the defendant and other National banks to compel them to execute the stipulation, and in particular to compel the defendant bank to execute the stipulation in question; and in holding that if the act was framed and enacted in the full expectation that the payment of the tax would be otherwise provided for, this would have no bearing on the validity of the tax or the power of the corporation regarding it, and the Court erred in holding that no apportionment of the amount paid among the individual depositors is required.

XXXV.

The Court erred in holding that, "It is clear from what has been said that the action of the defendant was freely and understandingly taken, without any expectation of deducting the amount paid from the sums due depositors, and therefore unaffected by the con-
121 ditions attending the making of an apportionment, whatever that may be. The agreement evidently arose from the banks' ability and willingness to pay the current rate of interest on savings deposits, and also the taxes of the depositors as represented by the proposed average. It may well be supposed that if the defendant had been looking to a recoupment, and had considered a recoupment impracticable, it would not have entered into the stipulation. If banks of this class had failed to avail themselves of the option their situation would have been the same as before.

XXXVI.

The Court erred in holding that, "Any chance the defendant has of paying at a loss results from his own agreement, and not from the taxing provisions of the statute."

XXXVII.

The Court erred in holding that, "The discussion has now reached a point where it will be safe to dismiss the theory of the defendant running through all its arguments, that the payment contemplated by the agreement is in reality the tax itself, and that the validity of the agreement depends upon the payment being the exact sum of the individual taxes. The stipulation is in fact an agreement to pay an amount in lieu of the taxes, to be determined by
122 a practicable method convenient to the bank, which will not be the exact amount of the tax for any semi-annual period, and which may favor either the bank or the State in a given instance, but which, as the business runs and on the average, will be substantially the amount required of the taxpayers. This narrows our inquiry to the question whether the variations and contingencies incident to the method adopted are such as place the undertaking beyond the power of the corporation."

XXXVIII.

The Court erred in holding that "It is at most but the taking of an ordinary business risk in connection with a reasonable expectation of substantial gains. The question is whether an agreement of this nature is properly incident to the authorized business of the bank."

XXXIX.

The Court erred in holding that "It is clear that the bank's agreement is not foreign to the purpose of its creation. It is contract designed to promote the interests of the corporation in an authorized branch of its business. It is calculated to subserve the convenience of a class of depositors whose patronage is desirable, by relieving

them from personal attention to the matters of return and
123 on payment. The mere fact that this is done in co-operation with the state and under a system provided by its statutes, does not determine that the act is ultra vires. We cannot see that the bank's undertaking involves it in any relations with the state that are inconsistent with its position as a creation and instrumentality of the Federal government. There is nothing in the obligation assumed that amounts to a substantial burden, or subjects the resources of the bank to any considerable risk."

XL.

The Court erred in holding that, "In the case before us nothing whatever is required of the bank in connection with the exercise of its option. The return which the defendant speaks of as a visitorial requirement is not preliminary to the exercise of the option but preliminary to the payment. There is nothing in the nature of the agreement which brings the bank making it into association with State institutions, or places any of its interests in the keeping of a State official. In view of the considerations mentioned we think that it was within the power of the corporation to execute a stipulation of this character."

XLI.

The Court erred in holding that the statute applies to resident depositors only and not to non-resident depositors and not unconstitutional on that ground.

124 XLII.

The Court erred in holding as follows: "The defendant's agreement, although in terms an agreement to pay seven-twentieths of one per cent on the average amount of all the deposits, is declared to have been entered into for the purpose of carrying out the provisions of the statute and thereby relieving its depositors from the tax imposed upon them, and the scope of its understaking is to be measured by the extent of the taxation as now determined. So the amount of the judgment will be arrived at by a computation based upon the credits of resident depositors."

XLIII.

The Court erred in holding that the stipulation in question was not an agreement to pay the taxes of the depositors having interest-bearing deposits in the defendant bank.

XLIV.

The Court erred in holding that the tax provided by the act in question, to be paid by the defendant under its stipulation, was not the tax of its depositors, but a sum in lieu thereof.

XL.

The Court erred in failing and refusing to hold as claimed by t
defendant as follows:

125 (1). That on the material facts agreed upon the plaint
is not entitled to recover.

(2). That there had been no actual or legal assessment of the t
and for that reason alone the defendant could not be held on t
stipulation.

(3). That the tax had been provided by the act to be assess
against the individual depositors on their deposits in said bank, b
such assessment had never been completed and effected; and that t
stipulation was to pay a different sum and a different thing from t
amount of the tax attempted to be assessed, and was without co
sideration.

(4). That the bank was without power to enter into said stip
lation, and that the same constituted an act ultra vires.

(5). That the stipulation was an incomplete novation, illegal a
non-enforceable, on that ground also, as there was no previous val
obligation in that the tax had not been assessed by the act nor co
pleted and made effective by a valuation and levy, nor did the d
positors agree to such stipulation and the said stipulation was inval
as ultra vires. Also the stipulation calls upon the bank to contra
for an indefinite number of depositors or persons primarily requir
to pay the tax.

126 (6). That the act in question is unconstitutional a
makes an unlawful discrimination between depositors in N
tional banks and depositors in state savings banks and trust co
panies, and also between national banks as such and state banks
such, and between individual depositors in national banks and b
tween individuals generally, and an unlawful discrimination again
national banks.

(7). That the act in question is in violation of article 9 of t
constitution of the state of Vermont, and illegal in other respec
in that the tax is not proportional or apportioned and not uniform
The tax rate is different from that on the same class of property
the hands of other persons and tax payers, the method of assessme
and collection is different, and the classification is not the same
made on like property owned by other tax payers, is not reasonab
and is unusual and arbitrary and based on no distinction and tak
the property of citizens and of the defendant and of its deposito
without due process of law. No notice was given to the individu
depositor and he had no opportunity to be heard.

127 (8). That the act is in violation of the fourteenth amen
ment of the constitution of the United States, in that the t
is not uniform and the act causes discrimination and creates i
equality in the burdens of taxation and takes property of the d
fendant and of other citizens of Vermont and of other states wit
out due process of law; the act denies to a class of citizens the equ
protection of the laws; and, also, the act results in a lack of un
formity of taxation upon the same class of subjects, to wit, deposi

in national banks, and between deposits in national banks and state banks.

(9). That the act is illegal because it undertakes to tax the deposits of non-residents of the state of Vermont, making no distinction between residents and non-residents in the provisions as to the average of deposits on which the bank must pay the tax, and requiring the deposits of non-resident depositors to be included therein.

(10). That in reality the tax the bank is required to pay is one upon the franchise of the bank, based upon the average of its deposits of the class created, and the act is therefore illegal and unconstitutional.

(11). That the act discriminates between national banks and individuals in that it taxes the same class of choses in action
128 at a different rate in the one case than in the other; and in that the act is a state tax on a class and is a different tax at a different rate from the tax on the same class of property in the hands of individuals. Also it discriminates against national banks in that it requires to be disclosed the name of the bank holding deposits of the class sought to be taxed.

(12). That the stipulation created no legal obligation.

(13). That the bank cannot make itself good for all it has to pay the state, as the average of deposits on which it is required to pay the tax includes deposits that have been withdrawn before the amount became due under the stipulation.

(14). That the act is unconstitutional in that it impairs vested rights of depositors of the bank under their contracts therewith.

(Signed) MARVELLE C. WEBBER,
MAXWELL EVARTS,
Attorneys for Defendant.

(Endorsed:) Filed March 15, 1911. H. A. Harman, Clerk Supreme Court.

129 And on the 15th day of March, A. D. 1911, in accordance with the prayer of the petition of said defendant, a writ of error to the Supreme Court of the United States, allowed by the Chief Judge of the Supreme Court and issued by the Clerk of the Circuit Court of the United States for the District of Vermont, was lodged and filed with the Clerk of the Supreme Court of the State of Vermont for the County of Rutland, and also at the same time and place a copy thereof was lodged for the plaintiff (defendant in error,) personally addressed to said plaintiff, (defendant in error). The following endorsement was made upon said writ of error and upon said copy.

Writ of error Filed March 15, 1911. H. A. Harman, Clerk of the Supreme Court.

And on the same 15th day of March A. D. 1911, a citation signed by the Chief Judge of the Supreme Court of Vermont and the said

Clerk of the Supreme Court of Vermont, under seal of the Court, has returned into Court with service duly accepted in writing thereon; which citation is hereto annexed.

130 UNITED STATES OF AMERICA,
Supreme Court of Vermont,
County of Rutland:

I, Henry A. Harman, Clerk of the Supreme Court of the State of Vermont for the said County of Rutland, by virtue of the foregoing writ of error and in obedience to the commands thereof, do hereby certify that the above and foregoing is a full, true, perfect and complete transcript of the record of said Supreme Court, in the cause therein entitled, and of the opinion of the Court in the same cause, and of the assignment of errors and prayer for reversal and of all the proceedings had in the cause of The Clement National Bank, plaintiff in error vs. the State of Vermont, defendant in error, as the same remain of record and on file in my office, together with the original writ of error and the original citation; and I herewith transmit the same to the Supreme Court of the United States.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the Supreme Court of the State of Vermont for said County, at the City of Rutland, this sixth day of April, A. D. 1911.

[Seal State of Vermont Supreme Court.]

H. A. HARMAN, *Clerk.*

131 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Supreme Court of the State of Vermont, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Vermont, before you at the January General Term of 1911, thereof, being the highest Court of law or equity of the said State in which a decision could be had in a suit between the Clement National Bank, defendant and plaintiff in error, and the State of Vermont, plaintiff and defendant in error, (1) Wherein was drawn in question the validity of a statute of said State of Vermont on the ground of its being repugnant to the constitution or laws of the United States, and the decision was in favor of its validity, and (2) Wherein also was drawn in question the construction of Statutes of the United States and rights, privileges, immunities and exemptions claimed to exist thereunder of the defendant as a National banking corporation, and the decision was against the said rights, privileges, immunities and exemptions specially set up under said Statutes, a manifest error has happened to the great damage of the said Clement National Bank, as by its complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy

ce done to the parties in this behalf, do command you, if judgt be therein given, that then, under your seal, distinctly and ly, you send the record and proceedings aforesaid, with all gs concerning the same, to the Supreme Court of the United s, together with this writ, so that you have the same at the City Vashington, District of Columbia, before the Supreme Court of the United States on or before thirty days from the date hereof to the end that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States cause further to be done therein to correct that error, what of t and according to the laws and customs of the United States it to be done.

Witness the Honorable Edward D. White, Chief Justice of the reme Court of the United States, this 11th day of March A. D. , and of the Independence of the United States the one hundred thirty-fifth.

[Seal Circuit Court U. S. A., Vermont District.]

FREDERICK S. PLATT,
Clerk of the Circuit Court of the United States, District of Vermont.

llowed,

JOHN W. ROWELL,
Chief Judge of the Supreme Court of Vermont.

[Endorsed:] No. 6776. State of Vermont Supreme Court. State of Vermont vs. The Clement National Bank. Writ of or. Filed Mar. 15, 1911. H. A. Harman, Clerk Supreme rt.

STATE OF VERMONT,
Supreme Court:

STATE OF VERMONT
vs.
THE CLEMENT NATIONAL BANK.

Citation.

President of the United States to the State of Vermont, Greetng:

ou are hereby cited and admonished to be and appear before the reme Court of the United States at the City of Washington in District of Columbia, within thirty days from the date hereof, suant to a writ of error filed in the Clerk's office of the Supreme rt of the State of Vermont, in a suit wherein the State of Verit is Plaintiff and the Clement National Bank is Defendant, to v cause, if any you have, why the judgment of the Supreme rt of the State of Vermont in the said writ of error mentioned,

should not be reversed, modified or corrected, and speedy justice should not be done in that behalf.

Dated at Randolph Vermont, this 11th day of March 1911.

[Seal State of Vermont, Supreme Court.]

JOHN W. ROWELL,
Chief Judge of the Supreme Court of the State of Vermont.

Attest:

H. A. HARMAN,
Clerk of the Supreme Court of the State of Vermont.

At Brattleboro, in County of Windham, State of Vermont, on this 15th day of March A. D. 1911, I hereby accept service of the foregoing citation upon the State of Vermont and waive all other and different service thereof.

CLARKE C. FITTS,
Attorney for State of Vermont.

135 [Endorsed:] No. 6776. State of Vermont Supreme Court. State of Vermont vs. The Clement National Bank. Citation. Filed Mar. 15, 1911. H. A. Harman, Clerk Supreme Court.

Endorsed on cover: File No. 22,615. Vermont Supreme Court. Term No. 567. The Clement National Bank, plaintiff in error, vs. The State of Vermont. Filed April 10th, 1911. File No. 22,615.

Office Supreme Court, U. S.
FILED.
MAR 24 1913
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1912

No. 29

THE CLEMENT NATIONAL BANK,
Plaintiff in Error.

v.

THE STATE OF VERMONT,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

Brief for Plaintiff in Error.

MAXWELL EVARTS,
MARVELLE C. WEBBER,
of Counsel for Plaintiff in Error.

SUBJECT INDEX.

Arbitrary Classification,
Selection of depositors in National banks is an 58-68
Assessment, no valid 75-81
No notice of 81-89

Classification, arbitrary 58-68
Consideration, no valid, for stipulation 53-89

Deposits, property of the bank 18
Assessable to depositors only 18
Discrimination of the Statute 53-74
Discrimination against depositors by exemptions..68-70
Discrimination between depositors in National banks and in Savings Banks and Trust Companies.... 70
Discrimination between depositors in National banks and individuals generally 70-71
Discrimination against National banks 71-73
Discrimination against general tax payer 73
Discrimination against stockholders 72
Discrimination against depositors in National banks 71-73
Duress, Statute constitutes, upon bank 33-38
Due process of law, property of depositor taken without 74-89

Errors, Specification of 15-16
Equal protection of law, denied by the Statute....53-74

Facts, show tax on bank 27-30
Fourteenth Amendment, violation of 53-89
Franchise taxes, taxes measured by average deposits are 22-27

Interference, Statute constitutes unlawful, with National banks 17-40

National Banks, Statute an attempt to tax.....17-33

Obligation of Contracts, Statute impairs 38-40

Questions raised 9-10

Statement 1-16
Statute void as attempt to tax National banks 22
System of taxation in Vermont 59-64
Statute, The, constitutes a tax on National banks ..17-33
Void as an attempt to tax National banks.... 22

Tax, Statute constitutes tax on National banks....17-33
Tax, title indicates purpose to tax National banks..17-18
Tax, phraseology of Statute shows same purpose..18-19
Tax, Stipulation and return show purpose to tax National banks 19
Tax, purpose to tax National banks shown by similarity to Statute taxing Savings banks.....19-22
Tax, purpose to tax National banks shown by facts 27-30
Tax, Statute is a tax on bank because it cannot recoup 30-33
Tax measured by average deposits is franchise tax 22-27
Tax considered as on depositor is unconstitutional..53-89

Ultra Vires, Stipulation is 40-52

A LIST OF THE CASES CITED IN THIS BRIEF.

Name of Case	Report	Pages in Brief
Aberdeen Bank v. Chehalais,	166 U. S., 440	31
Aluminum Co. v. Ramsey,	222 U. S., 251	69
Atchison, Topeka & St. Fe Ry. Co. v. O'Connor,	223 U. S., 280	38
Bank v. Millard,	77 U. S., 152	18
Bank v. New York,	121 U. S., 138	22
Bank v. Dearing,	91 U. S., 29	22
Bank v. Converse,	200 U. S., 425	47
Baron v. Burnside,	121 U. S., 186	50
Bells Gap R. R. Co. v. Penn.,	134 U. S., 232	59, 55
Boston v. Beal,	51 Fed., 306	31
Bowen v. Needles Bk.,	94 Fed., 925	48
Central Transp. Co. v. Pullman Car Co.,	139 U. S., 24	49
City of New Orleans v. Houston,	119 U. S., 265	25
Commercial Nat'l Bk. v. Pirie,	82 Fed., 799	49
Commonwealth v. Lancaster Sav. Bk.,	123 Mass., 493	23
Commonwealth v. People's Bank,	5 Allen, 428	23
Commonwealth v. Del. D. C. Co.,	123 Pa., 594	75
Commonwealth v. Lehigh V. R. R. Co.,	104 Pa., 89	87, 76, 75
Concord Nat'l Bk. v. Hawkins,	174 U. S., 364	49
County of Yuba v. Adams,	7 Cal., 35	18
Davis v. Elmira Sav. Bk.,	161 U. S., 275	22
Davidson v. New Orleans,	96 U. S., 97	84
Dollar Sav. Bk. v. United States,	19 Wall., 227	79
Doyle v. Cont'l Ins. Co.,	94 U. S., 535	50
Dorley v Abilene Bk	179 Fed 461	51

Name of Case	Report	Pages in Brief
Farmers & Traders Bk. v. Hoffman,	93 Ia., 119	31
First Nat'l Bk. v. Nat'l Exch. Bk.,	92 U. S., 122	49
First Nat'l Bk. v. Converse,	200 U. S., 425	51
Gaar, Scott & Co. v. Shannon,	223 U. S., 468	38
Gulf Colorado & St. Fe Ry. v. Ellis,	165 U. S., 150	67, 59, 57
Hagar v. Reclamation Dist.,	111 U. S., 701	88, 82
Hatch v. Reardon,	204 U. S., 152	54
Hayes v. Missouri,	120 U. S., 68	56
Holy Trinity Church v. United States,	143 U. S., 457	18
Home Ins. Co. v. Morse,	87 U. S., 445	50
Howley v. Hurd,	72 Vt., 122	22
Huling v. Kan. Valley Ry.,	130 U. S., 559	82
In re Opinion of Justices,	79 Atl., 31	73
Jones v. Winthrop Sav. Bk.,	66 Maine, 242	76, 23
Keeney v. New York,	222 U. S., 525	57
Kentucky R. R. Tax Cases,	115 U. S., 321	85, 83, 71, 54
King v. United States,	99 U. S., 229	79
Magoun v. Ill. Tr. Co.,	170 U. S., 283	69, 56
Merchants Nat'l Bk. v. Wehrman,	202 U. S., 295	51
Metropolitan Stock Exchange v. Nat'l Bk.	76 Vt., 303	48
Manhattan Co. v. Blake,	148 U. S., 412	18
Maxwell v. Griswold,	51 U. S., 241	36
McCullough v. Maryland,	4 Wheat., 316	48, 22
McCormick v. Market Nat'l Bk.,	165 U. S., 538	49
McMillen v. Anderson,	95 U. S., 37	83
Mutual Loan Co. v. Martell,	222 U. S., 225	58
New Orleans v. Houston,	119 U. S., 265	25, 31
Nicol v. Ames,	173 U. S., 509	56
Norton v. Bank,	61 N. H., 589	49

Name of Case	Report	Pages in Brief
Osborn v. Bank, 9 Wheat., 738		22
Owensboro Bk v Owensboro	173 U.S. 664	42
Paulsen v. Portland, 149 U. S., 30		82
People v. Nat'l Bank, 123 Cal., 53		18
People v. Hastings, 29 Cal., 449		78
Provident Ins. Co. v. Mass., 6 Wall., 611		23
Robertson v. Frank Bros. Co., 132 U. S., 17		37
Scammon v. Kimball, 92 U. S., 362		18
Society for Sav. v. Coite, 6 Wall., 594		23
Southern Pacific v. Denton, 146 U. S., 202		50
Spencer v. Merchant, 125 U. S., 345		82
State v. Bradford Sav. Bk., 71 Vt., 234		78, 23
State v. Franklin Co. Sav. Bk., 74 Vt., 246		18
State v. Hoyt, 71 Vt., 59		69, 67
State Railroad Tax Cases, 92 U. S., 575		83
Stapylton v. Thaggard, 91 Fed., 93		31
Swift v. United States, 111 U. S., 22		35
Turpin v. Lemon, 187 U. S., 51		81
United States v. Fisher, 2 Cranch, 358		18
United States v. Palmer, 3 Wheat., 610		18
United States v. Erie Ry. Co., 107 U. S., 1		79
United States v. Phil. & Read. R. R. Co., 123 U. S., 113		79

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 266.

THE CLEMENT NATIONAL BANK,
Plaintiff in Error.

v.

THE STATE OF VERMONT,
Defendant in error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

BRIEF OF THE PLAINTIFF IN ERROR.

Statement.

This case comes ~~in~~ to this court on a writ of error to the Supreme Court of the State of Vermont to review a judgment of that Court. It involves the consideration of a statute of the State of Vermont, which, in our view, undertakes indirectly to tax National banks, and is in other respects illegal.

The plaintiff in error is a National bank, organized under the Federal Statutes, and operating a bank at Rutland, Vermont.

For convenience we will refer in this statement to the plaintiff in error as the Bank, and to the defendant in error as the State of Vermont.

For some years prior to the year 1906 and since that time the bank had and has maintained a savings department, and on deposits in said department has allowed interest at a rate exceeding two per cent per annum, payable on the first days of January and July. In the year 1906 the said bank had large sums of money so on deposit. In that year the General Assembly of the State of Vermont passed an act, No. 41 entitled, "*An Act to Assess a State Tax on Interest Bearing Deposits in National Banks.*" This act afterwards became Chapter 37 of the Public Statutes of Vermont and is entitled, "*Taxation of National Bank Deposits.*" The full text of this statute is appended to this brief. (Appendix, pp. 91-95.)

The first five sections of the statute relate to the ascertainment of the names of all persons having interest-bearing deposits in National banks, the banks wherein such deposits are held, and the amount of the individual deposits on the first days of April and October in each year. Every depositor in a National bank is required to make a report of the amount of his deposit on blanks prepared and furnished to him by the Commissioner of State Taxes. Resident depositors are required to make such report to the town listers the local tax assessors, on the first day of April in each year. The statute provides that interrogatories be inserted in the tax inventory as to the amount of the individual deposit, if any, in National banks, and the name of the banks. The local town listers

are required to report to the Commissioner of Taxes the names of all persons whose inventories show that they have deposits in a National bank in the state on the first day of April, the amount of such deposit, and the name of the bank. Following these preliminary provisions of the statute providing for an ascertainment of the names of banks having such deposits and of the individual depositors therein, and of the amount of the deposits, the statute proceeds to provide for an *assessment of a tax* in these words:

> "Sec. 809. Every person so having a deposit in a National bank as aforesaid shall semi-annually, except as otherwise provided by this chapter, *pay a tax to the State*, which is hereby assessed *at the rate of seven-twentieths of one per cent* semi-annually upon the amount of such deposit so held by such National bank on the first day of April and October; and no deduction therefrom shall be made on account of any exemption. The *taxes imposed by this section* shall be paid to the State Treasurer semi-annually on or before the last day of May and November next following the dates whereon the reports provided for in the fourth preceding section are required to be made."

It is provided that *no other tax* shall be assessed on such deposits in National banks, nor against the depositors. A penalty is imposed upon a depositor who wilfully fails to make returns or pay *the tax provided by the act*. *The tax* and the forfeiture may be recovered in an action on the statute. There are certain exemptions provided, which will be noticed in our brief, but at present the only exemption we will call attention to is the provision exempting from the operation of the act persons having deposits whereon interest not exceeding two per cent per annum is paid or allowed, which limits the act to interest bearing deposits drawing two per cent or more per annum.

We now come to the provisions of the act which we maintain characterize it as an attempt *to tax National banks.* We quote these provisions:

> "Sec. 814. BANKS MAY ELECT TO PAY. If a National bank in this state so elects, *it may pay to the state all taxes provided by this chapter*; and it shall be lawful for such bank *to deduct such taxes so paid* from the interest or deposits then or thereafter held by it belonging to the person from whom such tax became due."
>
> "Sec. 815. SAME; STIPULATION. If a National bank elects to so *pay such taxes to the state* and to make returns as hereinafter provided, it shall semi-annually, on or before the first day of April and October, file with the Commissioner of State Taxes *a stipulation setting forth such fact;* and thereupon such bank shall become *liable to the state for such taxes* for the six months named in such stipulation and to make returns as hereinafter provided; and no depositor in such bank shall be required to make the returns hereinbefore specified covering the six months period for which such stipulation was filed."
>
> "Sec. 817. BANKS LIABILITY. Every bank filing such stipulation shall thereupon become *liable to the state for the amount of such tax of seven-twentieths of one per cent of the average amount of such deposits held by said bank* during the six months beginning with the first day of April and October respectively, for which such stipulation was filed."

Banks filing such stipulations are required to file with the State Treasurer and Commissioner of State Taxes a return, verified by oath, showing the average amount of its deposits for the period covered by said return.

Under the requirements of the act the bank filed a stipulation to make returns to the State Tax Commissioner of its average deposits and to pay *to the State of Vermont*

seven-twentieths of one per cent per annum on such average deposits. (Record page 14, Art. I; page 20, Exhibit A.) The bank claims that in filing said stipulation it did so under compulsion and not by its free choice and election. It did not file returns. (Record page 14, Art. I.) The state brings this action, declaring upon the stipulation and alleging that the bank filed the stipulation in consideration that no depositors should be required to make returns showing the amount of his deposit, *and that no depositor should be required to pay the tax imposed by law* on said deposit, whereby the state sets up in its declaration, "*the said bank became liable to and promised to pay to the State of Vermont the amount of the tax imposed by law upon the depositors to whom such deposits belonged.*" The stipulation is appended in full to this brief, but at this time we call the Court's attention simply to the provisions in the stipulation that the bank will make sworn returns to the State Treasurer and Commissioner of State Taxes showing the average amount of all deposits held by it during the period covered by the stipulation, and that "*it will pay to the State Treasurer a tax of seven-twentieths of one per cent of the average amount of all such deposits so held by it.*" (Appendix, pp. 95-97.)

Upon filing such stipulation the Commissioner of State Taxes issued to the bank a certificate, which is appended in full to this brief and is referred to; but we need now to call to the Court's attention only the following quotation therefrom;

> "This certifies that the Clement National Bank has this day filed with the Commissioner of State Taxes *a stipulation that said bank has elected to pay and will pay to the State of Vermont the tax required by law upon all interest bearing deposits held by it during the six months beginning October* 1*st*, 1908, whereon the rate of interest

exceeds two per cent per annum; and that it will file with the state Treasurer and Commissioner of State Taxes sworn returns showing the average amount of such deposits held by it during such period." (Appendix, p. 97.)

In the blank return furnished by the state officials to the National banks the banks are required to make sworn statement as to *the average amount of all deposits* of whatever nature held by the national bank making the return, on which it allowed interest exceeding two per cent per annum. At the foot of each return are the following headings with blank spaces for the figures, viz.:

Balance subject to *taxation*.....$———
Tax at 7-20 of 1 per cent for 6 mos.....$———

(Record; Appendix, pp. 98-100.)

At the time when this act was passed there was in existence no state taxation upon any class of individuals, but all persons were subject to local taxation in the town or city where he resided. By the system of taxation of the State of Vermont each individual is required to make and file with the listers an inventory of his taxable property on the first day of April in each year, and by the law of the state then in force he was required to include in his list all real and personal property, including choses in action, and among these all deposits in National banks and deposits in savings banks and trust companies in excess of two thousand dollars in any one bank, and he was liable thereon at the local rate fixed by the officials of the town or city in which he resided.

The average local rate of taxation throughout the state for the year 1908 was sixteen and seventy-hundredths dollars per thousand dollars of taxable property set in the grand list, the minimum being seven and fifty hundredths

dollars per thousand dollars, and the maximum thirty-nine and eighty hundredths dollars per thousand dollars. (Record page 17, Art. XIV.)

At the time when said act was passed the only special tax laws known to the State of Vermont were special laws providing for,

1. Taxation of corporations upon their property, business or corporate franchises.
2. Charter fees for incorporation.
3. Taxation of collateral inheritances.
4. Taxation of peddlers.

Under the law taxing corporations upon their franchises there are special provisions taxing domestic savings banks, savings institutions and trust companies. By the provisions of that law in force in the year 1906 savings banks, savings institutions and trust companies were *taxed at the rate of seven-tenths of one per cent. per annum upon the average amount of deposits*, after making certain required deductions.

These taxes were made payable semi-annually in the months of February and August of each year. The law then in force provided that no other tax should be assessed upon such deposits nor against the depositors, except on individual deposits in excess of two thousand dollars in any one institution. We say then in force because in the year 1910 the law was amended so that there is no limit to the amount that an individual can now have free from taxation to the individual in savings banks and trust companies.

It must now be clear that the large amount of deposits in National banks in their savings departments appeared to afford an opportunity to levy a special tax by the state, if only a scheme could be devised that would enable the state to tax deposits in National banks in a way similar to the tax

upon deposits in domestic savings banks. The tax obtained from the taxation of state savings banks and trust companies afforded a large income to the state. If a scheme could be devised so that the state would in effect get a tax, or the equivalent of a tax, upon the savings deposits in National banks the state would get a greatly increased revenue. Whatever actuated the tax authorities of the State of Vermont and the General Assembly in originating this unique scheme of taxation, we find that as a matter of fact, *at a time when the state was taxing savings banks upon their average deposits, a law was passed, the effect of which has been to increase the revenues of the state out of average deposits in National banks which have been paid to the state by the banks themselves and not by the individual depositors.*

As indicating the intent of the State Legislature to tax National banks, we would call the attention of the Court to a bill introduced in the General Assembly of the present year to amend the statutes "*Relating to the Taxation of Deposits in Savings Institutions and National Banks.*" We quote from the title. In the same bill it was proposed to increase the tax on savings institutions from seven-tenths of one per cent, annually to eight-tenths of one per cent, and to increase the tax on deposits in National banks from seven twentieths of one per cent semi-annually to eight-twentieths of one per cent semi-annually. The proposed act is appended to the brief. It shows that the General Assembly looks upon deposits in National banks as a source of revenue on a par with deposits in savings banks and to be taxed in substantially the same way, namely, on their business or franchises. The proposed act is also significant in that it shows a disposition to increase the amount of the tax. The bill failed of passage, however. (Appendix, pp. 100-102.)

Briefly stated the questions raised for consideration of this court are involved in the following propositions:

1. The Vermont Statute constitutes an unlawful interference with national banks as Federal instrumentalities in three respects; (1) That the tax the bank is required to pay is in effect and reality and by design a tax upon the bank's franchises; (2) That the statute is by design and in effect a duress upon the bank, compelling it to execute the stipulation to retain its depositors; (3) The statute interferes with existing contracts between the bank and its depositors and impairs their obligation.

II. The bank was without power to enter into the stipulation and its act in so doing is *ultra vires* and void.

III. There was no valid consideration for the stipulation.

This proposition involves the contention that the tax considered as one upon the depositors, violates the Fourteenth Amendment to the Constitution of the United States in two respects.

A. The tax levied in pursuance of the act, if enforced, constitutes a denial of the equal protection of the laws, in that, (1) It makes an arbitrary classification for the purpose of taxation, in that it selects as a class depositors in National banks; (2) It discriminates by its exemptions; (3) It discriminates between the depositors in National banks and depositors in state banks and trust companies; (4) It discriminates between depositors in National banks and individuals generally, and (5) it discriminates against National banks.

B. The act violates the Fourteenth Amendment to the Federal Constitution, in that the tax levied in pursuance of said act, if enforced, would take the property of the depositors without due process of law, in that, (1) There was no

valid assessment and none provided for, and (2) The tax is assessed, if assessed at all, without proper notice to the depositors.

For some years prior to the enactment of the statute the bank has allowed depositors in its savings department interest exceeding two per cent per annum, payable on the first days of January and July, on sums in the banks on those dates, for such calendar month that they had been on deposit prior thereto. Sums drawn out at any time between these interest periods received no interest. (Record pages 14-15, Art. II.) Deposit books were issued to the depositors containing the terms of the contract. (Record pages 23-25, Exhibits D, E.) Certain other depositors received certificates of deposit with interest at three per cent per annum for each calendar month. (Record page 15, Art. I; and Exhibit F, page 26.) There were upward of one thousand depositors, sixty-eight of whom resided outside the state and the remaining number in fifty-two cities and towns in the state. (Record page 16, Art. VII.)

Under this method of allowing interest, according to the rules and practice of the bank, it is impossible for the bank to determine at the time it is required by the statute and stipulation to make its sworn returns, upon what amount of deposits it will allow interest at the next interest paying period, as it would be impossible to tell what amount would then remain on deposit. (Record page 15, Art. IV.) In past periods in order to make the return required by the statute and the stipulation, the banks have included all this class of deposits in making up its average deposits. (Record of page 15, Art. III.) For the period covered by the stipulation in this case the bank was required to include in its average deposits, and is held to pay a tax, on the sum of $7,516.12, on which it actually paid no interest, because the deposits

were made and withdrawn between the interest paying periods. Of this amount the sum of $3,002 .12 was not subject to the tax against the depositor, because not deposited till after October 1, 1908. (Record page 16, Art. VIII.) There is included in the average deposits on which the bank is held to pay, deposits to the amount of $81,644 .52, on which the depositor would not be required to pay because on the date fixed by the act for the assessment of the tax, October 1, 1908, it was not in the bank. (Record pages 16-17, Art. IX and X.) This is ascertained by deducting from the amount in bank April 1, 1909, the amount in bank October 1, 1908, less the withdrawals between that date and April 1, 1909. (See Brief page 28.)

Eleven depositors having deposits of $4,561 .95 because such after October 1, 1908, the date of assessment against the depositor, and ceased to be such before April 1, 1909; and forty-eight depositors having deposits aggregating $22,530 .54 on October 1, 1908, ceased to be depositors before April 1, 1909, the date fixed for the returns by the bank. (Record pages 16-17, Art. IX.) Beside the class of deposits included in the provisions of the statute, the bank had large sums of money on deposit subject to check and not bearing interest. (Record page 17, Art. XIV.)

The average deposits were ascertained by getting the monthly average of daily deposits and then averaging the monthly average for the period covered by the stipulation (Record page 16, Art. VI.) In these averages are included the deposits of non-residents, because so insisted upon by the Commissioner of Taxes. (Record page 16, Art. VI.) But these non-residents deposits have been taken out from the judgment against the bank by the State Supreme Court.

The significance of these facts is that, in the actual work-

ing of the statute, (1) The bank has been compelled to include in its average of deposits sums of money on which it paid no interest, although the tax against the depositor is intended to affect only interest bearing deposits; (2) It has also been compelled to include therein large sums of money deposited after that date on which the tax is assessed against the depositor, and so not taxable against the depositor under the statute; (3) and also large sums of money which were withdrawn before the bank's interest paying date, so that it could not, if it so wished to do, deduct from the depositor's account the amount of their taxes, as provided by the statute. The amount of state tax the bank will be required to pay on any deposits or on all deposits is always, at the dates it pays interest on such deposits, unascertained and unascertainable.

Therefore, if the tax the bank is required to pay is the tax against the depositor, the bank pays a different sum from the aggregate of the depositors tax, and pays on sums which the depositor could not have been held to pay upon. And by reason thereof the bank could not recoup from the depositors the amount of the depositors' taxes paid by it. *This cannot be anything else than a tax upon the bank itself.*

In this connection it should be emphasized that no attempt was ever made to obtain returns from the depositors; their names were never ascertained, nor the amount of their individual deposits, and no valuation thereof was ever attempted. (Record page 15, Art. V.)

Notwithstanding the fact that the act itself provides that the bank may elect to pay "*all taxes* provided by the statute," and that thereupon the bank shall become liable to the state *for such taxes;* and notwithstanding that this action is brought to receive *upon such liability*, and upon a stipulation agreeing to pay to the state *a tax upon the average*

amount of its deposits, the Vermont Supreme Court utterly ignores the provisions of the Act and of the stipulation and of the declaration itself and holds that the bank has agreed *"to pay an amount in lieu of the taxes, to be determined by a practicable method * * * * which will not be the exact amount of the tax * * * * but which as the business runs and on the average will be substantially the amount required of the taxpayers."* (Record page 45, Fol. 90.) This is not judicial construction; it is so-called judicial legislation. If the Vermont Court is not right in this conclusion the act must fall. For the State of Vermont cannot tax National banks, nor can any state; and National banks cannot agree to be taxed, nor can they agree to pay the taxes of individuals whether they are depositors or otherwise. It is *ultra vires.* The Vermont Court herein does violence to the provision of the statute, to the express terms of the stipulation, and to the liability declared upon. The distinction it makes is without difference. An amount in lieu of a tax which is substantially the same as the tax, and is arrived at by a method in use in the state for determining the amount of franchise taxes, *cannot be anything but a tax.*

The whole act is a clever scheme to tax National banks. Of all the National banks in the state not one refused to sign these stipulations. They were compelled to do so to save their depositors, either from other National banks which might sign a stipulation, or from savings banks which paid the tax and exempted depositors up to the amount of $2,000 in each bank. The Supreme Court of Vermont recognizes that the act may have been framed in the full expectation that the individual depositors would not have to pay the tax. (Record pages 43-44.) The fact that the individual depositors have not in a single case

paid the tax, but that it has been paid by the banks is proof of the cleverness of the scheme by which the National banks were manouvered into the position of being *compelled to pay a tax to the state.* If the present law stands, there will soon be an increase in the rate of the tax and it could be then increased to the point of destroying the savings departments of the National banks. They would be driven out of this line of business.

This suit was instituted in the Rutland County Court, and the State declared in assumpsit upon the stipulation signed by the bank, by the terms of which stipulation the Bank was required to "*make sworn returns to the State Treasurer and Commissioner of State Taxes showing the average amount of all deposits held by it during the six months' period*" in question on which it paid interest exceeding two per cent per annum and "*to pay to the State Treasurer a tax of seven-twentieths of one per cent of the average amount of all such deposits so held by it.*" The consideration named in the stipulation is the exemption of the depositors from the statutory requirement to make tax returns and pay the taxes on the deposits, to the State. (Record p. 20; Stipulation) (pp. 2,-14; declaration).

The judgment of the Rutland County Court was in favor of the State of Vermont to recover the amount claimed, which included the average deposits of non-resident depositors; as well as the average deposits of resident depositors, but the State Supreme Court held that the deposits of non-residents were improperly included and reversed the judgment of the County Court, and granted judgment to the plaintiff in the sum of $3,989.85.

The State Supreme Court having eliminated from the judgment the inclusion of non resident depositors, and having construed the statute to be intended to apply to

resident depositors only, while still contending that the plain reading and plain import of the statute expresses a direct purpose and intent to tax non-residents as well as residents, and that in practice, as shown by the record in this case, the state officials insisted upon non-resident deposits being included in the average of deposits, we suppose that this question is now eliminated from consideration.

The assignment of errors set forth in the record, pages 51 to 61, are numerous and somewhat repetitious, but the errors so raised may be grouped so that generalizing them we may state the following as our

SPECIFICATION OF ERRORS.

The Supreme Court of the State of Vermont erred:

First, in not holding that the Vermont Statute constitutes an unlawful interference with National banks as Federal instrumentalities.

Second, in not holding that the tax the bank is required to pay is in effect and reality and by design, a tax upon the bank's franchises, and so a tax upon the bank itself.

Third, in not holding that the statute is by design and effect a duress upon the bank, compelling it to execute the stipulation to retain its depositors.

Fourth, in not holding that the statute interferes with existing contracts between the bank and its depositors and impairs their obligation.

Fifth, in not holding that the bank was without power to enter into the stipulation and that its act in so doing is *ultra vires* and void.

Sixth, in not holding that, considering the tax as one upon the depositors, the stipulation was without consideration.

Seventh, And in this respect the Court erred in not holding that the Statute violates the Fourteenth Amendment

to the Constitution of the United States in that (A) it denies the equal protection of the laws, because (1) It makes an arbitrary classification for the purpose of taxation by selecting as a class of depositors in National banks; (2) It discriminates by its exemptions; (3) It discriminates between depositors in National banks and depositors in State banks and trust companies; (4) It discriminates between depositors in National banks and individuals generally; and (5) It discriminates against National banks.

And further the court erred in this respect in not holding that the Statute violates the Fourteenth Amendment in that (B) the tax levied in pursuance of the Statute would take the property of the depositors without due process of law, because (1) There was no valid assessment and none provided for, and (2) The tax is assessed, if assessed at all, without proper notice to the depositors.

FIRST POINT.

The Vermont Statute constitutes an unlawful interference with National banks as Federal instrumentalities.

This interference is manifested in three respects:

(1) THE TAX THE BANK IS REQUIRED TO PAY IS IN EFFECT AND REALITY AND BY DESIGN A TAX UPON ITS FRANCHISE AS A NATIONAL BANK, BEING BASED UPON THE AVERAGES OF DEPOSITS OF THE CLASS CREATED;

(2) THE STATUTE IS BY DESIGN AND IN EFFECT A DURESS UPON NATIONAL BANKS, COMPELLING THEM TO EXECUTE THE STIPULATION TO RETAIN THEIR DEPOSITORS.

(3) THE STATUTE INTERFERES WITH EXISTING CONTRACTS BETWEEN THE BANK AND ITS DEPOSITORS AND IMPAIRS THEIR OBLIGATION.

(1) THE TAX THE BANK IS REQUIRED TO PAY IS IN EFFECT AND REALITY AND BY DESIGN A TAX UPON ITS FRANCHISE AS A NATIONAL BANK, BEING BASED UPON THE AVERAGE OF DEPOSITS OF THE CLASS CREATED.

(a) *The title of the Statute indicates the purpose to tax the bank.*

"*Taxation of National Bank Deposits*" is the title of Chapter 37 of the Public Statutes. "*An Act to assess a State tax on interest-bearing deposits in National Banks*" is the title of the original Act No. 41 Laws of 1906.

The Statutory designation, while not absolutely controlling, is generally an important element in determining what kind of a tax the State imposes.

Gray on Limitations of Taxing Power, p. 42, Sec. 55 and authorities cited in note 49.

Holy Trinity Church v. United States, 143 U. S. 457, 462.

United States v. Fisher, 2 Cranch, 358, 386.

United States v. Palmer, 3 Wheaton, 610, 631.

Machen Federal Corp. Tax Law of 1909.

p. 5 of introduction, note 1.

The deposits become the property of the bank, not of the depositor, while the depositor becomes a creditor of the bank to the amount of the deposit.

Bank v. Millard, 77 U. S. 152.

Scammon v. Kimball, 92 U. S. 362, 369.

1 *Morse on Banking*, Sec. 289.

State v. Franklin Co. Sav. Bank, 74 Vt. 246.

Manhattan Co. v. Blake, 148 U. S. 412, 424.

They are assessable to the depositor only and as debts owing by the bank.

People v. Nat'l Bank, &c., 123 Cal. 53.

County of Yuba v. Adams, 7 Cal. 35.

(b) *The phraseology of the Statute discloses the real purpose to tax the bank itself.*

Section 804 requires the depositor to report the *name of the bank* where he has his deposit.

Section 805 requires the depositor to report to the lister the "*names of all banks* located in this state wherein he has or has had any such deposits."

Section 806 requires that the depositor shall state in his tax inventory "*the name of such bank* and amount of such deposit, with all accrued interest,"

Section 807 requires the listers to report the names of depositors, the amount of their individual deposits and "the name of the bank holding such deposit."

Section 808 gives right of inspection to the commissioner, attorney general and the states attorney of the county "wherein *such bank* has its principal place of business or said depositor, if a resident of this State, has his domicile."

Section 810 provides that, "No other tax shall be assessed *on such deposits in national banks*, nor against the depositors on account thereof."

Section 820 provides that, "Nothing in this chapter shall be construed as exempting from taxation *any deposit in any national bank, except as hereinbefore provided.*"

All the way through the act occurs and recurs this phraseology, which emphasizes the purpose as indicated in the title, and shows that it was the intention of the legislature to *tax the deposits* in national banks throughout the State.

(c) *The stipulation and the return formulated by the State officials show that in actual operation of the Statute it was construed as a tax on the bank itself.*

The stipulation provides that the bank "will pay to the State treasurer *a tax* of seven-twentieths of one per cent of the average amount of all such deposits so held by it." (Record p. 20, fol. 39.)

The return provides a blank space for "Balance subject to *taxation*" and another blank space for "*Tax* at 7-20 of 1% for six months." (Record p. 22, fol. 42.)

(d) *The similarity between the Statute under consideration and the Statute taxing Savings banks on their franchises, confirms our contention that it was the purpose of the State legislature to tax the bank itself.*

It is to be noticed that the amount of the tax against the savings banks and trust companies is seven-tenths of one per cent, annually, upon the average amount of their deposits. This is precisely the amount and method of the tax claimed under this stipulation. The same rate and on the average amount of deposits in both cases.

Is this not an attempt on the part of the Legislature to tax National banks on their savings deposits, at the same rate, and to effect the same result, as in the case of the savings banks? National banks, holding their charters from the National government, had to be dealt with in an indirect way, hence the first ten sections of the statute, 804 to 813 inclusive, which there was never any expectation would be enforced against the individual depositor, and this is recognized by the Vermont Court when it said:

> "It is easily conceivable that the provisions laying a tax on the depositors were framed and enacted in the full expectation that the payment of the tax would be otherwise provided for." (Record pp. 43-44, fol. 87.)

This is the interpretation the Vermont Court puts upon the purpose of the legislature; or at least conceives such might have been its purpose and expectation.

The Vermont Court further says:

> "The State has had for many years a system by which *deposits in Savings banks, savings institutions and trust companies are taxed against the corporation and the depositors relieved from taxation upon their deposits* to a certain amount, while other claims against solvent debtors, including deposits in banks other than those above enumerated, are subject to general taxation. It seems probable that the interest of the State to encourage and facilitate the appearance in larger volume of a class of property that easily escapes taxa-

tion, and a desire on the part of National banks to share in the benefits accruing to the savings institutions from the operation of this special law combined to produce the legislation in question." (Record p. 44, fols. 87-88.)

We concede that what the court says as to the interest of the State to encourage deposits in National banks for the purpose of taxation may be true, but we do not agree as to what it says of the desire of the National banks. The argument assumes that banks did not then have the deposits, while as a fact they did. The deposits were there before the passage of the Statute to tax them, and the law was enacted to tax them; and the very provision of the law requiring a report of the names of the banks where the deposits were held, shows that the State was seeking to find what banks held such deposits, who the depositors were, and the amount of the deposits. It can hardly be presumed that the National banks were joining with the State to saddle themselves with the burden of this law and to become liable for taxes on these deposits, when they had them already without such burden.

The Vermont Court recognizes the similarity of this Statute to the one taxing savings banks.

Public Statutes, Sections 744 and 745, assesses an annual tax of seven-tenths of one per cent upon the average amount of its deposits, etc., upon savings banks and trust companies.

Section 746 requires these taxes to be paid semi-annually based upon returns for the previous six months. It also provides that no other tax shall be assessed on such deposits nor against the depositors on account thereof, etc.

Sections 696-698 provide for the formulation of returns to be made by the banks.

Section 817 of the Statute in question makes the bank liable "for the amount of such tax of seven-twentieths of one per cent of the average amount of such deposits" for each six months' period—a tax of seven-tenths of one per cent annually.

Section 818 requires the National banks filing the stipulation to file a return verified by oath showing the average amount of the deposits for the period covered.

Section 810 provides that no other tax shall be assessed *on such deposits* in National banks, nor against the depositor on account thereof.

The similarity of the provisions of the statute in question to those of the statute taxing savings banks on their franchise must be apparent without further comment, and demonstrates that the State was seeking to make National banks pay a similar tax to that paid by savings banks.

The Statute being an attempt to tax National Banks is absolutely void.

Davis v. Elmira Savings Bank, 161 U. S. 275, 283.
Bank v. New York, 121 U. S. 138.
Bank v. Dearing, 91 U. S. 29.
McCullough v. Maryland, 4 Wheat. 316.
Osborn v. Bank, 9 Wheat, 738.
Howley v. Hurd, 72 Vt. 122.
Owensboro Bk v Owensboro 173 U.S. 664

The sum the bank is called upon to pay is based on the average of the deposits for the period. This measures the amount to be paid by the bank. Taxes on banks and savings banks measured by the amount of their deposits, have generally been

held to be privilege or franchise taxes, imposed on the privilege of doing business as a banking corporation.

Gray on Limit of Taxing Power, pp. 43-4, sec. 56.
Socy. for Sav. v. Coite, 6 Wall, 594.
Provid. Inst. vs. Mass., 6 Wall, 611.
Com. vs. Peoples Bank, 5 Allen, 428.
State vs. Bradford Sav. Bank, 71 Vt. 234, 238.
Com. v. Lancaster Sav. Bank, 123 Mass. 493.
Jones v. Winthrop Sav. Bank, 66 Me. 242.

In *State v. Bradford Savings Bank*, 71 Vt. 234, and in *State v. Franklin County Savings Bank & Trust Company*, 74 Vt. 246, the Vermont Supreme Court has held that a tax based upon the average amount of deposits in savings banks is a franchise tax.

In the *Bradford Savings Bank* case, at page 238, the court said, referring to the case of *Provident Institution v. Massachusetts*, 6 Wall. 611, that:

> "In that case, it was held that a tax based upon the average amount of deposits was a franchise tax. Such has also been the holding of the courts in *Society for Savings v. Coite*, 6 Wall 594," and other cases there cited. "In the case at bar, the tax is levied directly by an act of the legislature and is payable into the State treasury. * * * * The amount of its deposits shows the indebtedness of the corporation to its depositors, and does not necessarily bear any relation to the actual value of its taxable property. There is no assessment of property to ascertain its value in comparison with the value of other taxable property in the community. The amount of the tax is determined solely by the extent of the business of the corporation as measured by the average amount of its deposits for the time for which the tax is assessed, after making the deduction specified. On authority and reason it is clear that it is a franchise tax, and V. S. 547 (P. S. 686) makes it clear that it was intended to be such a tax."

In *State v. Franklin County Bank* supra, the Court said:

> "That the tax required to be paid by sections 583 and 584 is a franchise tax, was decided in the case of *State v. Bradford Savings Bank & Trust Company*, 71 Vt. 234. Such a tax is upon the privilege of conducting the business under a corporate organization. Cooley on Taxation, 34. (p. 254.)"

In *Jones vs. Winthrop Savings Bank*, 66 Me. 242, the Statute required savings banks to pay the State treasurer one-half of one per cent. on the average amount of its gross deposits held on the first Saturday of each month for the last six months prior to a return of such deposits.

The Court said:

> "The question now presented is, whether the tax claimed is a valid one. If, under the statute, the tax first becomes a valid subsisting claim against the bank when the return is made, it is clear that in this case it cannot be recovered (because the bank was then in the hands of receivers) * * * * * (243). But it is claimed that it is a tax on the deposits, and therefore accrues as soon and as often as a deposit is made. The statute provides that the return shall be made by the bank—upon the return the tax is based, and under the law can rest on no other foundation. If there is no return, there can be no tax. Besides, the only remedy provided in the statute for the recovery of the tax in case of non-payment, is by warrant of distress against the bank * * * (244). We are thus led to the conclusion that it was the intention of the Legislature that the tax should take effect from the date of the returns, and be levied upon a bank whose charter had not previously expired. The nature of the tax tends to the same conclusion. It is not a tax upon property, for no property is specified or referred to. Nor can it be a tax upon deposits, for no particular deposit pays the tax or any specific part of it. A deposit

withdrawn before the return, pays no part of it, though it may materially affect the amount to be paid. It must then be a tax upon the bank, or what is the same thing, upon its franchise. It does not and cannot attach to any other thing. Nor can it be sustained under the count as a tax upon property or deposits for as such it would not be uniform upon all property or all deposits. This question has been so fully argued and clearly settled in Massachusetts under a statute similar to ours, in Commonwealth vs. Peoples Five Cents Savings Bank, 5 Allen, 428, that we need consider no further. As a tax upon the franchise, it cannot bear the date of any deposit; nor can it be conceded that the Legislature made the assessment once for all. It fixed the basis upon which it was to be made; but a tax can hardly be said to be assessed until the amount is made certain. In this case, the amount cannot be ascertained even by computation, until the return is made. The deposit constantly varying, the average must also vary * * * * * The tax as a tax upon the franchise, must bear the date of the return. It rests upon that as a means of ascertaining the amount at that particular time. The reference to the deposits for the preceding six months is for no other purpose than simply to ascertain the amount of business done, as one method of ascertaining the value of the franchise and the amount of tax it should pay from time to time. The result is, that the tax is one upon the franchise of the bank, and becomes a subsisting debt only when the return is, or by law should be made."

In *City of New Orleans v. Houston*, 119 U. S. 265, the question was whether a tax was on the stockholders of the defendant company or on the corporation itself, and this Court held that it was substantially a tax on the corporation.

The Court said:

"In the present case the corporation is exempted by its charter from all other taxes and licenses of any kind whatever in excess of the sum of $40,000 per annum, and yet, by Act No. 77, though the assessment is not to be made upon its capital stock, but upon the shares of the shareholders appearing upon its books, nevertheless, the tax so assessed is to be paid by the company, although it is entitled to collect the amount so paid from the shareholders on whose account it is payable; but this payment by the company is to be made irrespective of any dividends or profits payable to the shareholder out of which it might be repaid. That it is substantially a tax upon the corporation itself, is unequivocally shown by the subsequent clause, which authorizes a deduction from the amount of the taxes assessed to each share on its proportion of the direct property tax paid by the company as such under Sections 1 and 3, and of all exempt property belonging to the corporation. But as all the property of the Louisiana State Lottery Company is exempt from taxes after the payment of the annual sum of $40,000, nothing remains to be charged as a tax upon the shareholder as distinct from the corporation under the provisions of this section. Indeed, it is quite apparent from the language of the whole section, that, while nominally the taxes authorized are not to be assessed upon the capital stock of the Corporation in the aggregate and as its property, yet, in substance that is its effect. The taxes are assessed upon the actual shares as registered in the names of individual shareholders, but are to be paid by the corporation, so that while the form and mode of taxation is changed, its substance remains as though assessed against the corporation by name. (pp. 278-279) * * * * * * A tax such as that sought to be imposed upon the company, * * * * is a tax upon the corporation within the meaning of

the prohibition of its charter, because it is compelled to become surety for taxes nominally imposed upon its stockholders, and is made liable primarily for their payment; a payment which in the first instance, must be made out of the corporate property, without other recourse than an action against individual stockholders to recover the amounts advanced on their account." (pp. 279-280).

(e) *The facts in the case show that the tax is on the business of the bank.*

The assessment against the individual depositor was never effected. There was no valuation of his deposit. The names of the depositors were not ascertained even, and no notice was given to the depositor. (Record page 15, Art. V. fol. 32.) There were upwards of one thousand depositors, sixty-eight of whom resided outside this state, and the remaining number in upwards of fifty-two towns and cities in the state. (Record p. 16 Art. VII. fol. 33).

The amount of the tax was ascertained by averaging the daily deposits held by the bank at the end of each day to obtain the monthly averages, and by averaging the monthly averages to obtain the average for the semi-annual period. (Record p. 16, Art. VI. fol. 32.) The monthly averages varied from $573,744.97 in October, 1908, to $606,928.44 in March, 1909. (Record p. 16, Art. VI. fol. 32.) It needs no fact and no argument to show that by the very nature of the business, there being constant deposits and withdrawals, the daily deposits would vary as well as the monthly deposits.

There was included in the average on which the bank is called upon to pay the tax the sum of $7,069.24 made after October 1, 1908, which was withdrawn prior to April 1, 1909. Of this the sum of $5,723.29 received interest, as it was in the bank on January 1, 1909, the interest computing

date, and the balance did not. (Record p. 16, Art. IX, fol. 33). No part of these sums was taxable against the individual depositors, and they could not have been assessed upon October 1, 1908, as the deposits were not then in the bank.

The sum of $20,726.28, in the bank October 1, 1908, was withdrawn before March 31, 1909, the date when the return should be filed. (Record p. 16, Art. IX. fol. 33.) This sum was included in the average on which the bank is required to pay, (Record p. 16. Art. VI. fol. 33) and yet it was not there when the return was required to be filed.

There was included in this average the sum of $4,514, deposited subsequently to July 1, 1908, and withdrawn prior to January 1, 1909, and the sum of $3,002.12 deposited subsequently to January 1, 1909, and withdrawn prior to July 1, 1909. And yet the bank paid no interest on these deposits. (Record p. 16, Art. VIII, fol. 33.)

Deposits to the amount of at least $74,575.28 were included in the average of deposits on which the bank is held liable, although they were not in the bank October 1, 1908, but were deposited after that date, and so were not assessable under the Statute to the depositor. This amount is found by deducting withdrawals between October 1, 1908, and April 1, 1909, amounting to $20,726.28, from the aggregate deposits, on October 1, 1908, of $569,323.75, and then deducting the result of $548,667.47 from the amount in bank April 1, 1909, of $623,242.75. (Record pp. 16-17. Art. IX.-X.)

The bank allows interest on such deposits as are in the bank on the interest paying dates, viz. January 1, and July 1, and deposits withdrawn prior to such dates are not allowed interest. (Record pp. 14-15, Art. II, fol. 31.) Nevertheless, since such deposits are received as interest-

bearing deposits, they are included in the averages on which the bank is called upon to pay the taxes. (Record p. 15, Art. III, fol. 31.) And the act required this. Sec. 817. At the time when the bank was required to make its return for the period in question, viz. March 31, 1909, it was impossible for it to determine upon what deposits in the bank at that time it would pay interest. (Record p. 15, Art. IV. fol. 31.)

From these facts it is plain to be discerned that the bank is required to pay a tax upon its business. For the bank is required to include sums of money which never receive interest at all, sums of money not in the bank on the date when the assessment is to be made against the depositor and on sums of money withdrawn before any return is required of the bank. The sum upon which it is required to pay the tax is not the aggregate of the sums on which the the depositor is required to pay; it is a different sum and ascertained without any regard to the amount of the individual deposits.

The depositor is to be assessed on the amount he has in the bank April 1 and October 1, of each year; while for the semi-annual period from April 1 to September 30, and from October 1 to March 31 in each year the bank is to make a return on the average for the period as determined at the end of each period.

The bank "electing" to pay the tax provided by the act instead of being permitted to pay just the taxes which the individual taxpayer would be required to pay thereunder (if lawfully they could be compelled to pay anything) is required to pay a tax upon the average of its deposits for the period of six months. In other words, the act imposes upon the bank a different tax than that upon the depositor in the first instance, that is, it is upon a different

sum, and upon a sum upon deposit at a different time, because the depositor is taxed only for the amount upon hand upon the first day of April, and the first day of October.

It is difficult to see why this is not the same kind of a tax as that upon deposits in savings banks, a franchise tax. Nor is it possible for the bank to arrive at the precise amount that under the provisions of the act it may lawfully deduct, if it can be done lawfully, from each depositor's deposit or interest on account of the tax paid by the bank, and the bank will be in a position of paying more tax to the State than could be collected of the depositors, or the State of receiving less than it would receive of the depositors if they paid the taxes on deposits according as the average amount of deposit in six months is greater or less than the actual amount on deposit on the first day of April and the first day of October in each year.

(f) *The tax is on the bank itself because it cannot recoup from the depositor the amount of the tax paid by the bank.*

Section 814 provides that, if a National bank elects to pay all taxes provided by the statute,

> "it shall be lawful for such bank to deduct such taxes so paid from the interest or deposits then or thereafter held by it belonging to the person from whom such tax became due."

Without arguing here that, since there is no valuation of the deposit against the depositor and none attempted this provides for the taking of property of the depositor without due process of law, we contend that it stamps the statute as taxing the National bank.

In each of the following cases the principle is recognized that when a bank is required to collect a tax levied by the state against the owners of shares of stock in said bank upon

said shares, but it appears that the bank cannot reimburse itself from assets of such shareholders in its hands, the tax becomes, under these circumstances, a tax upon the bank itself, and therefore invalid. It cannot be made necessary for the bank to institute and maintain a collection suit in order to be reimbursed.

Gray's Limitations of Taxing Power, Sec. 801 a.
Cooley on Taxation, 3rd Ed. Vol. 1, page 717, note 1.
Farmers & Traders Bank vs. Hoffman, 93 Iowa 119. 61, N. W. Rep. 418.
New Orleans vs. Houston, 119 U. S. 265.
Boston vs. Beal, 51 Fed. Rep. 306.
Stapylton vs. Thaggard, 91 Fed. Rep. 93.
Aberdeen Bank vs. Chehalis County, 166 U. S. p. 440.

In principle these cases apply to the case at bar, where the bank cannot recoup from the depositor the full amount paid by it.

The defendant cannot recoup for the whole tax, because,

(a) Deposits to the amount of $20,726.28, which were in the bank October 1, 1908, were withdrawn prior to March 31, 1909. (Record p. 16, Art. IX. fol. 33).

(b) Deposits to the amount of $7,069.24 were made after October 1, 1908, and withdrawn before April 1, 1909. (Record p. 16, Art. IX, fol. 33).

(c) Deposits to the amount of at least $74,575.28 were made after October 1, 1908, and were in the bank April 1, 1909. (Record pp. 16-17, Arts. IX and X, fols. 33-34).

All the foregoing deposits were included in the average of deposits for the six months period. (Record pp. 15, 16, Art. VI. fols. 32-33).

The net average for the period was $578,669.19, and seven twentieths of one per cent, thereof is $2,025.33. (Record p. 16, Art. VI, fol. 33).

The bank could not deduct anything from the deposits named in (b) and (c), because such deposits were not in the bank October 1, 1908, and it could not compel these depositors to pay anything toward reimbursing the bank for the tax paid on the average for the period, because the act (Sec. 809) levies the tax as to the depositor on the amount he has in the bank October 1, and provides (Sec. 810) that no further tax shall be assessed on such deposits, nor against the depositor on account thereof.

The bank could not, under any circumstances, retain more than seven-twentieths of one per cent. of any deposit.

Seven-twentieths of one per cent. of $569,393.75, the amount of deposits in the bank October 1, 1908, is $1,992.88 so that if the bank were able to take this amount from these deposits, it would have to pay the difference between said $2,025.33 and $1,992.88,which is $32.45, but of this amount in the bank October 1, 1908, $20,726.28 was withdrawn prior to March 31, 1909, was beyond the bank's control, and said sum of $32.45 would be further increased by seven-twentieths of one per cent. of $20,726.28, which is $72.19, and would bring the bank's loss to $104.64.

The bank could not properly collect of the depositors whose deposits were in the bank both October 1 and April 1 the full seven-twentieths of one per cent. of their deposits, as of said October 1, if such depositor would thereby be paying an amount greater than the ratio which the amount of his deposit, as of said date, bore to the average of deposits for the whole period.

It might also easily occur that the average of deposits for the period would be less than the amount of deposits in the bank October 1st, which demonstrates the great possibility of inequality between depositors in different banks, according as the averages may fluctuate and differ.

In no event should a depositor be required to pay the bank part of a tax based upon the deposit of some other depositor whose deposit has gone to make up the average, and has been withdrawn beyond the bank's control.

The bank could not deduct anything from the deposits in the bank October first and withdrawn before April 1st, at the time they were withdrawn, because the averages could not then be computed, nor the amount to be deducted be determined until the end of the period.

A further argument that the tax is on the bank is that the statute provides that *the bank may deduct the taxes of the depositors paid by the bank* (Section 814); *but this is of no avail to the bank as there was no assessment against the depositor for want of valuation and returns*, in this particular case, and there would not be in any case where the bank elects to pay, for all proceedings against the depositors and all requirements of them under the statute cease when the bank so "elects."

The bank would then have no enforceable rights against the depositors and could not take any part of these deposits to reimburse it, and if it did the depositor could recover it back. *The bank in so attempting to reimburse itself would be taking property of the depositors without due process of law; in fact would be taking property of another against whom it had no valid claim.*

(2) THE STATUTE IS BY DESIGN AND IN EFFECT AND REALITY A DURESS UPON NATIONAL BANKS, COMPELLING THEM TO EXECUTE THE STIPULATION TO RETAIN THEIR DEPOSITORS.

The provision of Section 814 of the Act that "If a National bank * * * * so elects, it may pay to the State all taxes provided by this Chapter," is in reality no choice at all.

An election is a choice between two or more things; the making an act of choice between two or more courses of conduct.

15 *Cyc.* 249.

What is the choice offered the defendant? The only choice we can see is the agreement to pay a tax on its average deposits to keep its depositors, who would otherwise be driven away by the special tax upon them. But this would be no choice. It would be a duress, a compulsion.

It is only in case the bank was liable to the state in some other way that it could exercise a privilege of election to do some other thing. But there is no other liability to the state and no other thing that the bank is called upon to do. The tax is provided to be assessed against the depositors The choice that the statute offers to the defendant is to agree to pay the tax or a substitute for that tax and thus save its depositors from the tax. But that is no choice, it is not an election. When the bank signs such a stipulation it agrees to pay some other person's obligations. That is an independent agreement, and not a choice between two obligations.

It is quite plain that the whole scheme was to compel the National banks to pay on their savings deposits in the same way, and at the same rate, as savings banks and trust companies.

The Act was contrived to frame such provisions as to publicity as would drive the depositors away, should they be enforced, to avoid the burdens of the act and to send them to savings banks where they would not be taxed. Not that it was the purpose of the State to actually drive the depositors away, but rather *to compel the bank, in order to keep them, to pay the tax itself.* And we say that

for the reason it was a duress upon the bank. It was no election. The bank was compelled to "elect" to pay the tax in order to keep its depositors. *It does not need any argument to convince that the depositors would not leave their deposits at three and one-half or four per cent. in the defendant's bank or in any National bank and pay this tax, when they could withdraw their deposits and put them in savings banks at as high a rate and pay no tax.*

The provisions of the act providing for an assessment against the individual depositors was never intended to be made operative further than to create such a situation that the National banks would be compelled to pay the taxes to keep the depositors. It is true that section 814 provides that the bank can recover the tax from the depositor; but how long would the depositor remain if he was to have the tax collected in that way? That provision contains no advantage to the bank; for to exercise its rights thereunder would be to drive the depositors away. The bank is therefore compelled to pay the tax by the purpose and operation of the statute. That is illegal.

We submit some authorities on the subject of duress in payment of taxes, which illustrate the application of the principle.

In *Swift v. United States*, 111 U. S. 22, this Court held that a payment made to a public officer in discharge of a fee or tax illegally enacted is not such a voluntary payment as will preclude the party from recovering it back. In that case the appellant was entitled under a Statute of the United States to a commission in money on adhesive stamps bought from the Bureau of Internal Revenue. The Bureau adopted a construction of the Statute requiring all persons purchasing such stamps to receive their statutory commission in stamps at their face value instead of money,

and refused to let purchasers have stamps unless they agreed to take the commission in stamps. Mr. Justice Matthews said:

> "This was in effect, to say to the appellant, that unless it complied with the exaction, it should not continue its business; for it could not continue business without stamps, and it would not purchase stamps except upon the terms prescribed by the commissioner of internal revenue. The question is whether the receipts, agreements, accounts, and settlements made in pursuance of that demand, and necessity were voluntary in such sense as to preclude the appellant from subsequently insisting upon its statutory right. We cannot hesitate to answer the question in the negative. *The parties were not on equal terms. The appellant had no choice. The only alternative was to submit to an illegal exaction, or discontinue its business. It was in the power of the officers of the law, and could only do as they required.* Money paid or other value parted with under such pressure, has never been regarded as a voluntary act within the meaning of the maxim, *volunti non fit injuria.*" (pp. 28-29.)

In *Maxwell v. Griswold*, 51 U. S. 241, the collector of the port of New York insisted that the importer's goods be appraised at the value at time of shipment, instead of at the invoice price, the former valuation being so much higher as to amount to a penalty, or that the importer voluntarily make an addition to the invoice price and so escape the penalty. The importer chose the latter course, paid under protest and brought suit to recover back. Mr. Justice Woodbury said:

> "Now, it can hardly be meant in this class of cases, that to make a payment involuntary, it should be by actual violence or any physical duress. It suffices, if the payment is caused on the one part by an illegal

demand, and made on the other part reluctantly and in consequence of that illegality, and without being able to regain possession of his property except by submitting to the payment. * * * * * * * * He (the importer) was unwilling to pay either the excess of duties or the penalty, and must be considered therefore, as forced into one or the other by the collector, *colore officii*, through the invalid and illegal course pursued in having the appraisal made of the value at the wrong period. * * * *" (pp. 255-256).

In *Robertson v. Frank Brothers Company*, 132 U. S. 17, this court held that the payment of money to a customs official to avoid an onerous penalty, though the imposition of that penalty may have been illegal, is sufficient to make the payment an involuntary one.

In referring to the verdict of the jury, Mr. Justice Bradley delivering the opinion of the Court, said:

"We do not see how the verdict can be set aside for error in the charge on this point (namely what the trial judge said as to duress), unless the law be that virtual or moral duress is insufficient to prevent a payment made under its influence from being voluntary. (p. 21) * * * * When such duress is executed under circumstances sufficient to influence the apprehensions and conduct of a prudent business man, payment of money wrongfully induced thereby ought not to be regarded as voluntary. But the circumstances of the case are always to be taken into consideration. When the duress has been exacted by one clothed with official authority, or exercising a public employment, *less evidence of compulsion or pressure is required*,—as where an officer exacts illegal fees, or a common carrier excessive charges. But the principle is applicable to all cases according to the nature and exigency of each." (p. 23.)

In *Atchison, Topeka & Sante Fe Ry. Co. v. O'Connor*, 223 U. S. 280, this court recently said, by Mr. Justice Holmes, that:

> *"Courts sometimes perhaps have been a little too slow to recognize the implied duress under which payment is made,"* (p. 286), referring to payment of taxes.

In *Gaar, Scott & Co. v. Shannon*, 223, U. S. 468, 471, Mr. Justice Lamar, delivering the opinion of the court, said:

> "Neither a statute imposing a tax, nor the execution thereunder, nor a mere demand for payment, is treated as a duress. It does not necessarily follow that there will be a levy on goods. Or, if there is, the citizen, to avoid the consequences of the levy, may pay the money, regain the use of his property, and maintain a suit for the recovery of what has been exacted from him. The legal remedy redresses the wrong. *But he has the same right to sue if he pays under compulsion of a statute, whose self-executing provisions amount to duress.* An act which declares that where the franchise tax is not paid by a given date a penalty of twenty-five per cent shall be incurred, the license of the company shall be cancelled, and the right to sue shall be lost, operates much more as a duress, than a levy on a limited amount of property. Payment to avoid such consequences is not voluntary but compulsory and may be recovered back." (p. 471).

We call special attention to the case of *Swift v. United States*, supra, where it was necessary to pay the tax to save the Company's business, as especially applicable to the case at bar.

(3) THE STATUTE INTERFERES WITH EXISTING CONTRACTS BETWEEN THE BANK AND ITS DEPOSITORS AND IMPAIRS THEIR OBLIGATION.

The agreed statement of facts shows that when the act in question became operative, and ever since, the defendant

bank had and has outstanding three kinds of deposit contracts as shown respectively by Exhibits D, E and F. (Record pp. 23-26 and Art. XIII p. 17).

Under Exhibit F. for instance, the bank has contracted to pay its depositors thereunder interest at the rate of three per cent per annum. (Record p. 15, fol. 31). If the act in question be of force, it permits the bank to violate the terms of such contract and to pay the depositor interest at the rate of two and three-tenths per cent per annum, and we contend that the effect thereof is to interfere with the depositors' vested rights under said contract and the obligation of the contract itself. It is no answer to the proposition to say that under said contract the bank has a right to reduce the rate of interest. In fact it does not reduce the rate of interest, but, seeking to exercise the attempted unlawful authority given it by the act, it pays the depositor two and three-tenths per cent interest and the other seven-tenths turns over to the state. Clearly as to non-resident depositors this is an unlawful violation of their rights under the contract and, as we believe, equally so as to depositors who reside within this state. The same contentions obtain as to Exhibits D and E.

The Vermont court disposes of this claim as unsound on the ground that the statute acts upon property and not upon the contract, and that all contracts are made with reference to the taxing power of the State. (Record p. 40 fols. 79-80). But the unsoundness of this reasoning is apparent when it is considered that no taxes have been assessed against the depositors, for want of valuation, and no reports or returns were ever made by them. (Record p. 15, fol. 32, Art. V.) Therefore, the depositor had not come under any liability to the State to pay the tax; and yet the Statute has provided that the bank may deduct the tax

from the depositor's deposit or interest thereon, notwithstanding no liability had accrued against him. (See Statute Sec. 814.) The effect of this would be to allow the bank to reduce the amount of interest on the deposit called for by the contract. How can this be anything else than a direct action upon the contract itself, to modify its terms?

Also, it provides for the taking of the depositor's property without due process of law.

The Statute also interferes with the right of the bank to contract freely with the depositors, and compels the bank to change its periods of interest to adjust its business to the requirements of the act.

SECOND POINT

The defendant was without power to enter into such stipulation and its act in so doing is ultra vires and not enforceable.

National banks have, besides other specific powers not required to be mentioned in this connection, the following powers under the statutes providing for their organization, "To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidence of debt, by receiving deposits, by buying and selling exchange, coin and bullion; by loaning money on personal security, and by obtaining issuing and circulating notes according to the provision of this title." U. S. Statutes, Section 5136, sub-head "Seventh." And, sub-head "Third:" "To make contracts."

The doctrine of *ultra vires* rests upon three considerations: (1) The obligation of anyone contracting with a corporation to take notice of the legal limits of the powers; (2) the interest of its stockholders not to be subject to risks which they have never undertaken; (3) and above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law. *McCormick v. Bank*, 165 U. S. 538, quoted in *Bowen v. Needles National Bank*, 94 Fed. 925, 930.

We contend that the stipulation in this case, when considered as an agreement, must be held to be either (1) an agreement to pay the taxes provided to be assessed by the statute against the depositors, or, (2) an agreement to pay a tax on average deposits of the bank. The Vermont Supreme Court in discussing the question of *ultra vires*, rejected this contention in these words:

> "The discussion has now reached a point where it will be safe to dismiss the theory of the defendant, running through all its argument, that the payment contemplated by the agreement is in reality the tax itself, and that the validity of the agreement depends upon the payment being the exact sum of the individual taxes." (Record p. 45, fol. 90.)

And the court then advanced a third view of the nature of the agreement by holding that,

> "The stipulation is in fact *an agreement to pay an amount in lieu of the taxes*, to be determined by a practicable method convenient to the bank, *which will not be the exact amount of the tax* for any semi-annual period, and which may favor either the bank or the State in a given instance, *but which as the business runs and on the average, will be substantially the amount required of the tax-payers.*" (Record p. 45, fol. 90.)

The Court then said:

> "This narrows our inquiry to the question whether the variations and contingencies incident to the method adopted are such as place the undertaking beyond the power of the corporation." (Record p. 45, fol. 90.)

We will consider first the Vermont court's construction of the agreement; and this court is not bound by that construction for the question vitally affects the interest of the United States, namely the right of a State to interfere with National banks. In developing the theory that the agreement is one "to pay an amount in lieu of the taxes," but which "as the business runs and on the average, will be substantially the amount required of the taxpayers," the Vermont court reached a point in the discussion where it thought it would "be safe to dismiss the theory of the defendant * * * *that the payment contemplated by the agreement is in reality the tax itself." (Record fol. 90.)

Is that not an admission that it was *unsafe* to do so until the contention of the defendant in that respect had been brushed aside? That is, it was necessary to dispose of the contention that the bank was thereby agreeing to pay the tax itself or the taxes of the depositors, for such an undertaking would surely be ultra vires.

But in what respect does the nature of the agreement, as construed by the Vermont Court, differ from the contention of the bank? Is it anything more than in name? If what the bank agrees to pay is "as the business runs and on the average * * * substantially the amount required of the tax payers," as conceded by the Vermont court, what real difference is there between that amount and the taxes required of the tax payers? If it is the same thing in amount, can the State circumvent the laws of the United

States limiting the powers of National banks, by saying that the amount is not the tax but something in lieu thereof?

But the Vermont court in forcing this construction does violence to the plain terms of the statute, the plain language of the stipulation, the return, the certificate and the declaration of the State in this action.

Section 814 provides that,

> "If a National bank in this State so elects, it may *pay to the State all taxes* provided by this chapter; and it shall be lawful for such bank *to deduct such taxes so paid* from the interest or deposits then or thereafter held by it belonging to the person *from whom such tax becomes due.*"

Could there be plainer language to express payment of the depositors' taxes by the bank?

Section 815 provides that,

> "If a National bank elects to *so pay such taxes to the State* and to make returns as hereinafter provided, it shall semi-annually * * * * file with the Commissioner of State taxes a *stipulation setting forth such fact;* and thereupon such bank shall become liable to the State for such tax for the six months named in the stipulation; * * * * * *"

Could there be plainer language to prescribe that the stipulation to be formulated should be one setting forth the fact that it had elected *to pay the depositors' taxes?*

Section 817 provides that,

> "Every bank filing such stipulation shall thereupon become liable to the State *for the amount* of such tax of seven-twentieths *of one per cent of the average amount of such deposits* held by such bank during the six months * * * * for which such stipulation was filed."

In that section we get the confusion between a tax on the depositors and a tax upon the bank's franchise, that is upon its average deposits. But it is plain that the liability provided is to pay the amount of the tax itself, and not an amount in lieu thereof. There is nothing in the act to aid such a construction by the Vermont court. Is there anything in the stipulation? Therein the bank agrees "to

> *pay to the State Treasurer a tax* of seven-twentieths of one per cent of the average amount of all such deposits so held by it."

(Record p. 20, fol. 39.)

Could language be devised to more plainly express an agreement of the bank to pay a tax to the State, and to pay a tax on its average deposits, namely, a franchise tax?

How then could the Vermont court find it "safe to dismiss the theory of the defendant * * * * * that the payment contemplated by the agreement is in reality the tax itself?" It rejected the plain language of the statute and of the stipulation and in effect substituted other words meaning another thing. Is this juducial construction or judicial legislation?

Now let us see what view the State had of the nature of the stipulation when it instituted this suit. After alleging the making of the stipulation and the consideration thereof the original declaration alleged that thereby "the said bank became liable to and promised *to pay to the State of Vermont the amount of the tax imposed by law* upon the depositors, &c." (Record p. 4, fol. 9; p. 6, fol. 13; p. 8, fol. 17, p. 10, fol. 22). The return provides blanks for the "Balance subject to *Taxation*" and the amount of "*Tax* at 7-20 of 1 per cent for six months." (Record p. 22, fol. 42). The certificate sets forth "that said bank has elected to pay and will pay to the State of Vermont *the tax* required by

law on all interest bearing deposits held by it." (Record p. 21.)

In the Statute, the stipulation, the return, the certificate and the declaration we find it is either (1) the tax on the depositors, or (2) a tax on the bank's average deposits that is referred to; *and nowhere is there any suggestion that it is an amount in lieu of the taxes that the bank agrees to pay.*

Referring to the contention of the bank that the agreement requires the bank to pay on deposits on which it receives no interest, on sums not in the bank at the date of assessment against the depositor, and on sums withdrawn before a return is required of the bank, that in making the payments stipulated for, the exact proportion will not be taken from any deposit, and that consequently the money of some depositors will be taken to complete the shares of others, or some of the money which the stockholders are entitled to by way of dividends would go for that purpose, that the bank cannot arrive at the precise amount to deduct from the depositor's account, nor recoup from the depositors the amount paid, and the figures given to support this contention, (Record pp. 42-43, fols. 84-86), the Court said:

> "The figures before given show the result of the method in the present case; but the smallness of the deficiency which falls on the bank in this instance must not be taken as a measure of the risk assumed by the stipulation. It is conceivable that something might occur to cause the withdrawal of a large amount of the bank's deposits in a very short time. But the undertaking is assumed only for a six months' period, and the per cent called for is so small that in such an event as we have supposed the drain upon the resources of the bank could not be serious. *It is at most but the taking of an ordinary business risk in connection with a reasonable expectation of substantial gains.* The question is

whether an agreement of this nature *is properly incident* to the authorized business of the bank." (Record p. 45, fol. 91.)

The Vermont court thereupon holds the agreement to be within the power of the bank to make, reasoning to this conclusion in these words:

> "It is clear that the banks agreement is not foreign to the purpose of its creation. It is a contract designed to promote the interests of the corporation in an authorized branch of its business. It is calculated to subserve the convenience of a class of depositors whose patronage is desirable, by relieving them from personal attention to the matters of return and payment. The mere fact that this is done in co-operation with the State, and under a system provided by its statutes, does not determine that the act is *ultra vires*. We cannot see that the bank's undertaking involves it in any relations with the State that are inconsistent with its position as a creation and instrumentality of the Federal government. There is nothing in the obligation assumed that amounts to a substantial burden, or subjects the resources of the bank to any considerable risk." (Record p. 46, fols. 92-93.)

Apparently the Vermont court was not willing to say that an agreement to pay the taxes of the depositors or a tax on the average deposits would be incidental to its powers as a national banking institution; but felt safe in holding that an agreement to pay an amount substantially the same as the depositors were required to pay was incidental to such business. This it says is an ordinary business risk in connection with a reasonable expectation of substantial gains.

The Court here overlooks the fact that the bank had the deposits before the State sought to tax them, and that the

bank was confronted with the question of how to keep those deposits. *The risk to the bank was in losing the deposits unless it signed the stipulation.* The question of substantial gains does not appear in the case as a ground for taking the risk of loss in signing the stipulation. The risk was taken to hold the depositors, so that they would not withdraw their deposits. Is taking such a risk within the incidental powers of a National bank; to submit to the duress of a statute to hold its business? Or to involve the stockholders of the bank in liabilities they never contemplated?

Bank v. Converse, 200 U. S. 425, 440.

What ground is there for the court to say the contract is "designed to promote the interests of the Corporation in an authorized branch of its business?" The contract was *designed* by the legislature by the terms of the statute to *raise a tax on the bank*, not to aid the bank in its business.

The Vermont court says that the contract "is calculated to subserve the convenience of a class of depositors whose patronage is desirable by relieving them from personal attention to the matters of return and payment." We are willing to concede that the legislature calculated to place the National banks in such a position that they would, in order to hold the patronage of their depositors, "relieve them from personal attention to the matters of return and payment" of their taxes, and assume to pay such taxes themselves. But in relieving the depositors from paying the taxes, how can it be said to be otherwise than that the bank in so relieving them actually pays their taxes for them? This certainly is *ultra vires*.

If the State has a right to tax the deposits at the rate of seven-tenths per cent, why not at any higher rate to the extent of compelling the bank to let its depositors with-

draw or pay such an excessive amount as would ruin the bank? The right to tax is the right to destroy.

McCulloch v. Maryland, 4 Wheat. 316.

The stipulation considered as an agreement to pay a tax on average deposits is a franchise tax, and the State has no right to assess such a tax or the bank to agree to pay it. The stipulation considered as an agreement to pay the tax against the depositor, is an agreement that cannot be sustained because no rights have matured to the State against the individual depositors, as the tax had never been assessed against them in that there was no valuation. (Record p. 15, Art. V. fol. 32.)

There is nothing in the statutes authorizing the organization and operation of this national bank or any other national bank chartered thereunder to agree to pay taxes of any individual depositing money in its bank, nor is there any provision in the statutes that authorizes the bank to agree to pay a tax, or the equivalent of a tax, upon its business as a franchise tax; on the contrary the law expressly forbids that states should assess a tax against national banks upon their privilege to do business. Referring to the provisions of the banking act the court said in *Bowen vs. Needles Nat. Bank*, 94 Fed. Rep. 925, 928: "There is in these provisions no grant of power to guaranty the debt of another nor can such guaranty be said to be incidental to the business of banking." (Cases cited.) The bank had guaranteed the payment of a certain person's checks. It had issued drafts in payment of checks and then stopped the payment thereof. The court held that the contract of the bank was *ultra vires*.

In *Metropolitan Stock Exchange vs. National Bank*, 76 Vt. 303 the Vermont court said: "With regard to contracts which

are *ultra vires* in the strict sense, the sound doctrine is that they are wholly void and not merely voidable; that a corporation is under perpetual disability to make them; that, therefore, there can be no ratification by the corporation, and that the corporation cannot be estopped from making the defense of *ultra vires* when it is sued for non-performance on its part." (p. 308.)

In *First National Bank vs. National Exchange Bank*, 92 U. S. 122, the court held that although dealing in stock is not expressly prohibited, nevertheless such prohibition is implied from the failure to grant the power.

In *Concord First National Bank vs. Hawkins*, 174 U. S. 364, the said bank had invested part of its surplus funds in the stock of an Indianapolis national bank, and while so holding and owning said stock received dividends thereon. The Indianapolis bank failed and its receiver undertook to collect assessments of the Concord national bank on the capital stock owned by it. The court held that the purchase of the capital stock was *ultra vires* and that although the contract had been fully performed and the Concord bank had received benefit thereunder in the way of dividends, yet it was not estopped thereby to interpose the defense of *ultra vires*.

> See, too, *Central Transportation Co. v. Pullman Car Co.*, 139 U. S. 24; *McCormick v. Market National Bank* 165 U. S. 538, 550, 6 Century Digest, col. 1655-1662.

That a national bank cannot enter into contracts of guaranty or suretyship, see also 21 Am. & Eng. Ency. (2nd Ed.) 376 (9) and cases cited; *Commercial National Bank v. Pirie*, 82 Fed. 799, 801-802; *Norton v. Bank*, 61 N. H. 589.

The effect of stipulations somewhat analogous to the one in question, has been considered by the Supreme Court of the United States.

The statutes of Wisconsin provided that a corporation organized in another state should not transact business in Wisconsin unless it stipulated in advance that it would not remove into the Federal court any suit which might be commenced against it by a citizen of Wisconsin. The corporation filed such stipulation, and then sought to remove a cause in violation of the terms thereof. It was held that the act in question and the stipulation made thereunder were obstructions to the right of removal secured by the Constitution of the United States, and provided for by Federal legislation, and that they were therefore repugnant to both, and that the statute was illegal and void and the stipulation of no effect.

Home Ins. Co. of New York v. Morse, 87 U. S. 445.

The effect of this decision is that the corporation has no right to waive and would not be permitted to waive its right of removal.

In *Baron v. Burnside*, 121 U. S. 186, in which the statute of Iowa was under consideration, the Supreme Court reiterated the doctrine of the last preceding case, and in referring to the same said, that the stipulation made by the company was not one which would bind it without reference to the statute, and further, that the agreement acquired no validity from the statute.

See also, *Doyle v. Continental Ins. Co.*, 94 U. S. 535. *Southern Pacific Co. v. Denton*, 146 U. S. 202.

Applying the doctrine of these cases to the case at bar, it may well be observed that the defendant here is without authority to make a contract to pay the taxes assessed against any of its depositors. It is in no sense incident to its business. The prohibition so to do is just as effective as if

precisely so stated, because the enumeration of its rights in legal effect is the exclusion of other rights and powers.

Suppose the national banking act in express terms provided that a national bank was without authority to agree to pay the taxes of its depositors, and was also without authority to agree to pay a tax upon its deposits like the one it stipulated to pay here, in other words, a franchise tax, would it be seriously contended that in the face of such express prohibition the stipulation in question would be operative? If so, the state, by its legislation, can set aside and annul the positive law of the United States and the corporation, by accepting such legislation, as it may be urged it has attempted to do here, may nullify the very statute upon which its existence rests and only from which its authority to act is derived.

To enforce a stipulation on the part of the defendant agreeing to pay such tax, would clearly cast upon it additional burden, and which was not contemplated in, and is not authorized by the statutes to which it owes its existence.

Other authorities on *ultra vires* acts:

First National Bank of Ottawa v. Converse, 200 U. S. 425.

Merchants National Bank of Cincinnati v. Wehrman 202 U. S. 295.

A very important case is that of *Dolley v. Abilene Nat. Bank*, 179 Fed. R. 461, Circuit Court of Appeals, Eighth Circuit. In considering the validity of the Kansas "Bank Depositors' Guaranty Act," which among other things provided that National banks might avail themselves of the act upon compliance with the prescribed conditions, the court said:

"The visitorial power of the State Bank Commissioner over the guaranteed banks, and his control of

> their liquidation in case of insolvency, including the authority to appoint receivers, are radically inconsistent with the jurisdiction of the Comptroller of the Currency conferred by Congress over National banks. There are other points of conflict in the operation of the Kansas statute and the National banking laws, and it is obvious that the National banks cannot lawfully avail themselves of the provisions of the State enactment. Without further and appropriate legislation by Congress, they cannot throw off their duties and obligations prescribed by the law of their creation, *or enter into any engagements that will subject their corporate affairs to the supervision of another sovereignty.* This view was expressed by the Attorney General of the United States in an Opinion delivered April 6, 1909. The Kansas statute should, therefore, be regarded as though it related exclusively to banks incorporated under the laws of the State." (p. 463.)

The stipulation in the case at bar does subject the Clement National bank "to the supervision of another sovereignty;" and this the bank cannot voluntarily or involuntarily submit to. The State cannot enforce any such supervision and the bank cannot consent to it. The bank is required to make sworn returns such as is shown by Exhibit C. (Record p. 21, fols. 41-43). This is a tax return. In the operation of the Statute, the State Tax Commissioner actually did undertake to supervise and control, by insisting upon the bank including in the returns deposits of non-residents. (Record p. 16, Art. VI, fol. 33). The State prescribes the form of the stipulation and the return.

THIRD POINT.

There was no valid consideration for the stipulation.

CONSIDERING THE TAX AS ONE UPON THE DEPOSITORS, WE CONTEND THAT IN THAT VIEW THE ACT VIOLATES THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THE FOLLOWING RESPECTS:

A. THE TAXES LEVIED IN PURSUANCE OF THE ACT, IF ENFORCED, CONSTITUTE A DENIAL OF THE EQUAL PROTECTION OF THE LAWS.

B. THE SAID TAXES, IF ENFORCED, CONSTITUTE IN EFFECT A TAKING OF THE PROPERTY OF THE DEPOSITORS WITHOUT DUE PROCESS OF LAW.

The plaintiff in error can claim the benefit of any illegality in the act, as the contention of the State is that the waiver of its right to enforce the taxes against the depositors in the plaintiff's bank furnishes the consideration for the stipulation sued upon by the State in this case. The Vermont Supreme Court held that such waiver constituted the consideration and in arriving at that conclusion considered the constitutionality of the act in the respects stated below as essential considerations to a correct legal conclusion.

A. THE ACT IS IN VIOLATION OF THE FOURTEENTH AMENDMENT IN THAT THE TAXES LEVIED IN PURSUANCE OF IT, IF ENFORCED, CONSTITUTE A DENIAL OF THE EQUAL PROTECTION OF THE LAWS.

The particular respects in which the act so offends we assert to be these:

(1) *It selects depositors in National banks and makes an arbitrary classification of them for the purpose of taxation.*

(2) *It exempts from that class* (a) *corporations organized for charitable, educational or religious purposes*; (b) *railroad, insurance, guaranty, express, telegraph, telephone, steamboat*

car, transportation, sleeping car, parlor car, mortgage, loan and investment companies; (c) *savings banks and trust companies:* (d) *National banks, and* (e) *persons having deposits on which interest is allowed at the rate of two per cent or less per annum, and thereby in some of these exemptions discriminates among the depositors constituting the class.*

(3) *It discriminates between depositors in National banks and depositors in State banks and trust companies.*

(4) *It discriminates between depositors in National banks and individuals generally.*

In approaching the discussion of this point we are aware that this Court has said that objections on the ground of arbitrary discrimination must be approached with the greatest caution, and that the general expressions of the Fourteenth Amendment must not be allowed to upset familiar and long established methods and processes by a formal elaboration of rules which its words do not import.

Hatch v. Reardon, 204 U. S. 152, 158.

Still these questions have been so many times before the Court that the reports contain the announcement of principles that amount to rules. While each case must be determined by its own facts and circumstances, still there must be applied to them the principles or rules of the decisions. We proceed, necessarily, to the citation of a few of the most important decisions of this Court.

In *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337, this Court said, by Mr. Justice Matthews:

> "The rule of equality, in respect to the subject, only requires the same means and methods to be applied impartially to all the constituents of each class so that the law shall operate equally and uniformly upon all persons in similar circumstances."

And in that case the Court held that the different nature and use of their property justify a discrimination made as between railroad compaies and other corporations in the methods and instrumentalities by which the value of their property is ascertained.

In *Bell's Gap Railroad Company v. Pennsylvania*, 134 U. S. 232, 237, this Court, by Mr. Justice Bradley, had this to say:

> "The provision in the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, and libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for the payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State legislature or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying, that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation."

In the case of *Nicol v. Ames*, 173 U. S. 509, 521, this Court said:

> "The question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural. If the classification be proper and legal, then there is the requisite uniformity in that respect."

In *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 293, 294, where the inheritance tax law of the State of Illinois was in controversy, Mr. Justice McKenna, speaking for the Court, said:

> "The clause of the Fourteenth Amendment especially invoked is that which prohibits a State denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances.' *Kentucky Railroad Tax Cases*, 115 U. S. 321, 337. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed. *Hayes* v. *Missouri*, 120 U. S. 68. Similar citations could be multiplied. But what is the test of likeness and unlikeness of circumstances and conditions? These expressions have almost the generality of the principle they are used to expound, and yet they are definite steps to precision and usefulness of definition, when connected with the facts of the cases in which they are employed. With these for illustration it may be

safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the State a wide latitude as far as interference by this court is concerned. Nor with the impolicy of a law has it concern. * * * * * * * * *

The rule, therefore, is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. In some circumstances it may not tax A more than B, but if A be of a different trade or profession than B, it may * * * * * * * In other words, the State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion. *It is not without limitation, of course. 'Clear and hostile discrimination against particular persons and classes, especially such as are of unusual character, unknown to the practice of our governments might be obnoxious to the constitutional prohibition,'* said Mr. Justice Bradley in *Bell's Gap Railroad v. Penn.*, 134, U. S. 232, 237. And Mr. Justice Brewer, in *Gulf Colorado & Sante Fe Railway v. Ellis*, 165 U. S. 150, 165, after a careful consideration of many cases said: '*It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection.*' "

In the recent case of *Keeney v. New York*, 222 U. S. 525, involving the constitutionality of the inheritance tax law of the State of New York of 1896, Mr. Justice Lamar, said:

"The Fourteenth Amendment does not diminish the taxing power of the State, but only requires that,

> in its exercise, the citizen must be afforded an opportunity to be heard on all questions of value, and shall not, by arbitrary and discriminatory provisions, be denied equal protection. It does not deprive the State of the power to select the subjects of taxation. But it does not follow that because it can tax any transfer, that it must tax all transfers, or that all must be treated alike. (p. 535.) * * * * * * * * * *There can be no arbitrary and unreasonable discrimination.* But when there is a difference it need not be great or conspicuous in order to warrant classification." (p. 536.)

In that case the Court held that the State could make a classification embracing transfers by descent, will or gift in contemplation of the death of the donor, without at the same time taxing transfers intended to take effect on the death of some person other than the grantor.

In *Mutual Loan Co. v. Martell*, 222 U. S. 225, 235, Mr. Justice McKenna said:

> "We have declared so often the wide range of discretion which the legislature possesses in classifying the objects of its legislation that we may be excused from a citation of the cases. *We shall only repeat that the classification need not be scientific nor logically appropriate, and if not palpably arbitrary, and is uniform within the class, it is within such discretion.*"

The above citations are quite sufficient as illustrations, to show what tests are to be applied. By the application of these tests does the Act violate the equality clause of the Amendment? We think it does.

(1) *The selection of depositors in National Banks to form a class for the purpose of assessing a State tax is an arbitrary classification.*

Such classification is not based upon any "reasonable ground;" it is "a mere arbitrary selection;" there is no difference between depositors in National banks and other banks "that bears a just and proper relation to the attempted classification." (*Gulf, Colorado & Sante Fe Railway v. Ellis*, 165 U. S. 150, 165.) Such a classification is a "clear and hostile discrimination against particular persons," is of "an unusual character" and "unknown to the practice of our governments." (*Bell's Gap Railroad v. Penn*, 134 U. S. 232, 237.)

The quotations are from the cases cited, and are cited in *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 293, 294, as furnishing the rule to be applied.

For a clearer understanding of our discussion of this and other points in our brief it would be of advantage to outline the scheme of taxation in Vermont.

The Public Revenue Laws are embraced in the Public Statutes under two divisions, in Title 10.

Part I. General Taxation.

Part II. Special Taxation.

Under the General Tax laws the provisions in force at the time the statute in question was passed and the stipulation signed and so far as important for consideration, here follow:

> "Section 510. Taxable personal estate shall be set in the list of the last owner thereof on the first day of April in each year in the town, village, school and fire district where he resides with the following exceptions:"

These exceptions need not be noted saving subdivision VIII, which provides:

> "Deposits in all savings banks, saving institutions and trust companies without the State; in all banks,

national banks and banking houses within or without this State, *other than in National banks within this State whereon interest exceeding the rate of two per cent per annum is paid or allowed by such national banks, and in savings banks, saving institutions and trust companies*; and the excess over two thousand dollars in any one savings bank, savings institution or trust company within this State, on the first day of April in any year, shall be set in the list to the owner thereof in the town, village, school and fire district wherein he resides."

Sections 536 and 537 provide for the formulation of inventories to be filled out by the tax payers on the first day of April in each year and delivered to the listers.

Section 548 provides that:

"The taxable personal estate contained in the inventory shall be appraised by the listers at its value in money on the first day of April; and the listers shall appraise each item of such property at such sum as they would appraise the same in payment of a just debt due from a solvent debtor, having regard to the current value of such property and the sales thereof, other than auction sales, in the locality where it is situated. The listers may appraise debts due or to become due from insolvent debtors at the valuation placed upon the same by such taxpayer or may examine the taxpayer under oath as to such valuation and may appraise the same as they deem just."

Section 549 provides that:

"The listers shall deduct from the appraised value of such personal estate a sum equal to the excess, if any, of the debts owing by such taxpayer over the aggregate amount of his United States government bonds and other stocks, bonds and loans exempt from taxation by the laws of this State, and the amount of his deposits in all savings banks, savings institutions and

trust companies in this State not exceeding two thousand dollars in any one institution, *and the amount of his deposits in all national banks in this State whereon interest exceeding the rate of two per cent per annum is paid or allowed by such banks*, and shall take one per cent of the balance as the list of the personal estate of such taxpayer."

Section 560 provides as to the Constitution of the grand list:

"One per cent of the appraised value of the real estate taxable to a person shall be added to the list of his personal estate; and the sum so obtained, with the amount of his taxable poll if any, shall constitute his grand list."

Sections 566 and 567 provide for hearing of persons aggrieved.

"Section 566. On the first Tuesday in May the listers shall meet at some place to be appointed by them and shall, on that day and from day to day thereafter, hear persons aggrieved by their appraisal or by any of their acts, until all applications are heard and decided, and correct the list accordingly. * * * Notice of the place of hearing shall be posted in the town clerk's office and in two other public places in such town on or before the twenty-fifth of April.

Section 567. A person aggrieved by the decision of the listers may, within twenty-four hours thereafter, appeal to the board of civil authority and shall notify the listers of his appeal and of the time appointed by the board for hearing the appeal. Said board shall hear and determine such appeals and shall order the list to be corrected accordingly, but no hearing shall be held later than the fourteenth day of May. * * * * * * * * *"

Section 576 provides that the State and County taxes assessed, and town, village, school and highway taxes

assessed or voted, shall be assessed on the grand list returned to the town clerk's office.

"Section 584. The provisions of this chapter shall not apply to the taxation of the deposits of savings banks, savings institutions and trust companies otherwise taxed by the laws of this State, except as provided in this chapter."

"Section 605. Taxes shall be uniformly assessed on the lists of the persons taxed unless otherwise provided by law."

Under the title of *Special Taxation*, special State taxes are assessed under the following heads:

Chapter 35. Taxation of Corporations.
Chapter 36. Charter Fees.
Chapter 37. Taxation of National Bank Deposits. (the Act under consideration.)
Chapter 38. Collateral Inheritances and Taxable Transfers.
Chapter 39. Taxation of Peddlers.

These are the only special tax laws of the State.

Under the title *Taxation of Corporations*, Section 686 provides for the assessment of a State tax upon the property, business or corporate franchises of railroad, insurance, guaranty, express, telegraph, telephone, steamboat, car, transportation and sleeping car companies, and mortgage, loan or investment companies.

Section 744, under the heading *Savings Banks*, provides that:

> "A domestic savings bank and savings institution herein shall annually pay a tax to the State, which *is hereby assessed at the rate of seven-tenths of one per cent upon the average amount of its deposits and accumulations*, after deducting therefrom the average amount not exceeding ten per cent of its assets invested in United States Government bonds, and the average

amount of the assessed valuation of the real estate owned by such corporation, and also the amount, if any of individual deposits in excess of two thousand dollars each, listed to the depositors in towns in this State wherein such depositors reside."

Section 745, under the heading *Trust Companies*, etc., provides that

"A domestic trust company or savings bank and trust company doing business herein shall annually pay a tax to the State, which is hereby assessed at the rate of seven-tenths of one per cent upon the average amount of its deposits, including money or securities received as trustee under order of Court, or otherwise, after deducting therefrom the average amount, not exceeding ten per cent, of its assets invested in United States government bonds, and also the amount, if any, of individual deposits in excess of two thousand dollars each, listed to the depositors in towns of this State wherein such depositors reside."

"Section 746. *Taxes payable when.* The taxes assessed by the two preceding sections shall be paid semi-annually, one-half in the month of February, and one-half in the month of August, and shall be based upon the returns for the six months ending with the last day of December and June next preceding. No other tax shall be assessed on such deposits or accumulations in savings banks, nor on such deposits in trust companies and savings banks and trust companies, nor against the depositors on account thereof, except on individual deposits in excess of two thousand dollars in any one institution."

As is seen by an examination of the foregoing outline of the tax laws of Vermont, all other persons are taxed under the general laws and not by special laws. Their lists are taken in the town or city where they reside or where their

property is, and they are all taxed under the same law and method, and by the same instrumentalities. No other creditor is required to pay a State tax upon debts owing to him. *A certain class of debts are selected by the Act in question, and all individuals owing such debts are provided to be taxed thereon at a different rate, at a different time, and by a different method, and by different instrumentalities, from other persons.*

Depositors in National banks alone of all the tax payers of the State of Vermont are required to make return semi-annually of the amount of their deposits in National banks and to pay a tax semi-annually at a fixed rate. *The act is a discrimination against them in that it singles them out from all other taxpayers and singles out one particular class of property belonging to individual tax payers and requires them to pay a tax to the State thereon at a different rate, at different times, and by different methods from what is required of them as to other property and what is required of other tax payers upon other property. This is a discrimination against them and it is an unreasonable classification for the purposes of taxation.* It imposes an unjust burden upon the depositors in National banks. It requires them to make public what banks they have deposits in and the amount of the deposits. No such publicity is required of other taxpayers regarding their personal property. Upon what reasonable ground can this classification be based?

During the period covered by the stipulation in suit there were forty-nine savings banks, savings institutions and trust companies in Vermont. (Record p. 18, XV, fol. 35.) What difference is there between depositors in National banks and depositors in these forty-nine savings banks, savings institutions and trust companies, that bears a

just and proper relation to the attempted classification? The depositors in the plaintiff in error bank resided in fifty-two different towns and cities of the State and there were sixty-eight non-resident depositors. (Record p. 16, VII. fol. 33.) Can it be said that a reasonable ground of classification is found in the fact that depositors in savings banks are relieved from paying a tax on their deposits because the bank pays a tax on its average deposits? But to argue that is to suggest that the real purpose of the Act is to tax the National bank on its average savings deposits to put it on a par with savings banks and trust companies. But what other reason did the legislature have? These debts of the National banks represented by the deposits were taxable to depositor at the place of his residence at a higher rate. (Record p. 17, XIII, fol. 35.) The advantage to the State would be in getting the National banks to pay taxes on its deposits in the same manner as Savings banks, or drive the deposits out of National banks into savings banks. Is not this legislation a "clear and hostile discrimination against particular persons," namely, the depositors in National banks, or the bank itself?

Is not this legislation of an "unusual character and unknown to the practice of our governments?" The citation from the tax laws of Vermont show this act to be an innovation. No similar legislation in sister States has come to our attention.

It is difficult to conceive what reason the State can offer for classifying deposits in National banks, for the purpose of taxation, differently than deposits in other banks, or differently than other interest-bearing or non-interest-bearing debts, or differently from other deposits in the same banks bearing a less interest or bearing no interest at all.

The classification is purely arbitrary, and based on no reasonable ground.

We can hardly conceive of a more arbitrary classification of property for taxation than is made in this act.

The State has selected a certain class of debts owed by National banks to individuals. In so doing it has also selected a certain class of person's property consisting of debts owing to them, and classified them differently from other debts owed to them. It further classifies these particular deposits in distinction from non-interest-bearing deposits in National banks, and deposits paying a less interest, notwithstanding that all these deposits of the different sorts might belong to the same individual. It also distinguishes this class of deposits from deposits of the same individual in savings banks and trust companies. *It is a purely arbitrary and unreasonable classification based on no sound principle of law.*

All the other special tax laws of the State are based upon entirely different principles from the tax law under consideration.

A tax against a corporation is a franchise tax and herein savings banks, telegraph and telephone companies, express companies, insurance companies, railroad and various other corporations are taxed upon their business. There can be no doubt of the right of the State to levy such taxes.

The act taxing peddlers is an excise tax.

It is therefore plain, that the act under consideration is a complete departure from any known system of taxation in the state of Vermont. The method of assessment and collection is different, and the rate of the tax is different from that upon the same class of property in the hands of other persons, and we know of no other similar legislation anywhere.

In *State v. Hoyt*, 71 Vt. 59, the Supreme Court of Vermont held unconstitutional a Statute which exacted a license fee from peddlers of goods the manufacture of the State of Vermont, on the ground that it violated the Fourteenth Amendment to the Federal Constitution in that, (1) It discriminated against citizens of Vermont in excluding goods manufactured in sister states, and, (2) that the classification was arbitrary.

In the opinion of the Court by Rowell, J., now Chief Judge of the Court, it is said:

> "The question, therefore, is one of classification. If in the case supposed, the resident and non-resident manufacturer or their goods can be differently classed, the Statute can be sustained otherwise not." (p. 64.)

The Court then cites the rule laid down by this Court in *Gulf, Colorado & Sante Fe R. Co. v. Ellis*, 165 U. S. 150, and proceeds.

> "Under this rule it seems impossible to make a classification here, for want of a sufficient ground on which to base it. It cannot be based upon any difference in the goods themselves, for they are precisely alike; nor on the fact that they were made in different States, for that bears no just and proper relation to a classification, but is purely arbitrary. It cannot be based on public policy; for it is not reasonable to say that it is for our interest to encourage the introduction and sale of goods of the non-resident manufacturer, when thereby the manufacturer and sale of the goods of the resident manufacturer would be discouraged and perhaps prevented altogether. Nor can it be based on the difference of residence of the manufacturers, for that, as in case of the goods, would be purely arbitrary also; and besides would allow a state to discriminate against its own citizens in favor of the citizens of other states, which it cannot do, any more than it can discriminate

in favor of its own citizens against the citizens of other States; for the equality clause of said amendment includes everybody." (pp. 64-65.)

We argued in the Vermont Supreme Court that the statute under consideration here was illegal because it plainly included non-resident depositors in terms and that in the operation of the law the authorities had so construed it. But the State Court construed the statute otherwise. (Rec-pp. 47-48, fols. 95-98.)

We now ask if the State can make a class of resident depositors, excluding non-residents belonging to the class and differentiated only in residence?

To undertake to differentiate on grounds of residence in *State v. Hoyt* was held arbitrary. Is it not arbitrary to select resident depositors to form a class for taxation, for the same reasons?

There is no more difference in the deposits here than in the case of goods there.

(2) *The Act discriminates among the depositors constituting the class by the exceptions made in Section* 819.

That Section is as follows:

"Section 819. *Exemptions.* The provisions of this Chapter shall not apply to municipalities; nor to corporations organized solely for charitable, educational or religious purposes; nor to railroads, insurance, guaranty, express, telegraph, telephone, steamboat, car, transportation, sleeping car, mortgage, loan or investment companies; nor to savings banks and trust companies, which have interest-bearing deposits in National banks; nor to National banks having an interest-bearing deposit in another National bank; nor to any person having any sum of money on deposit in a National bank whereon interest not exceeding the rate of two per cent per annum is paid or allowed him by such National bank."

In exempting from the provisions of the act in question depositors whose deposits are allowed interest at a less rate than two per cent the act makes an unwarranted discrimination among the depositors constituting the class. For the period covered by the stipulation the plaintiff in error had large sums of money subject to check and not bearing interest or on which the rate of interest did not exceed two per cent per annum. (Record, p. 17, XIV. fol. 35.)

These depositors would be left to taxation at the place of their residence at a higher rate. This is indiscriminate operation upon persons according to their relation, and is unconstitutional.

Magoun v. Illinois etc. Bank, 170 U. S. 283.
State vs. Hoyt, 71 Vt. 59.

In exempting the various corporations mentioned in section 819, the act discriminates against individual depositors, and it is no answer to say that these corporations are already taxed under other laws, as that is the same case as to the individual depositor, the only difference being that the individuals were taxable under the general law while the corporations were taxable under special laws. This is indiscriminate operation of the law upon persons according to their relation, and is unconstitutional. They are all depositors, and there is no sufficient legal reason why the operation of the law should not be equal upon all of them, being of the same class and in the same relation.

In *Aluminum Co. v. Ramsey*, 222 U. S. 251, where the validity of a Statute of the State of Arkansas abolishing the fellow servant rule as to corporations operating railroads and every Company, whether incorporate or not, engaged in mining coal, the plaintiff in error assailed the constitutionality of the Statute because it discriminated between

Corporations and individuals and partnerships. Mr. Justice McKenna said:

> "Whether that exact distinction, *that is, the distinction between corporations and partnerships and individuals is competent for a legislature to make*, under its power of classifying objects, we are not called upon to decide." (pp. 255-256.)

But in the case at bar we think the Court is called upon to say whether the legislature of Vermont could make such a distinction.

(3) *The Act discriminates between depositors in National Banks and depositors in State Savings Banks and Trust Companies.*

It discriminates against depositors in National Banks by making them a class for purposes of State taxation upon the banks' debt to them, and in favor of depositors in state savings banks and trust companies by not including them. In one view the discrimination is in the arbitrary classification. In another view it consists in subjecting depositors in National banks to requirements of publicity in the making of returns as to the amounts of their bank deposits and where kept, a requirement which is not imposed upon depositors in State banks. Then, too, the Act discriminates against depositors in National banks by allowing them no exemption, while depositors in State banks are not required to pay a tax on such deposits unless in excess of the sum of two thousand dollars.

(4) *The Act discriminates between depositors in National Banks and individuals generally.*

Taxpayers other than depositors in National banks may offset their debts against the appraised value of their choses-in-action. To such depositors such offset is not permitted.

In all other instances of taxation of choses-in-action, the taxation is upon the valuation of the same as ascertained and established by the listers; here there is no such valuation.

Taxpayers other than such depositors, are taxed upon their choses-in-action locally. Depositors in National banks are made to pay a special tax to the State. Also the act discriminates between depositors in National banks and individuals generally, by reason of the different methods and instrumentalities provided in the act for ascertaining the tax.

Under the general law the taxpayer makes out his own list and has an opportunity of a hearing before the listers as to the valuation placed upon his taxable property, and an appeal from the listers to the board of civil authorities. (P. S. Secs. 510, 548, 549, 566, 567 and ante.)

The depositor has no opportunity to be heard as to the valuation and no opportunity to review the valuation before an appellate tribunal.

See *Kentucky Tax Cases*, 115 U. S. 321.

(5) *The Statute discriminates against National Banks.*

It discriminates against National banks in that it requires to be disclosed the name of the banks holding deposits of the class sought to be taxed.

There is no other act in the state requiring the names of banks holding deposits of individuals to be disclosed by them in their inventories, nor is there any requirement under other laws giving publicity to the business of banks as is provided in the act in question. It cannot but be a discrimination against National banks to require the disclosure of its business provided in the first five sections of the act.

It will be noted that these provisions apply regardless of whether the bank elects to pay the tax or not, so that all National banks in the state are discriminated against in that respect whether they co-operate with the state in this enterprise or not. It is a special statutory provision giving publicity to the business of the bank, which is not provided against other banks in the state.

It may well be urged that this statute oppresses the depositor in the National bank and discriminates against the bank itself by requiring the depositor to make specific returns as to all banks wherein he has had any deposits during the year preceding the first day of April; no such duty is imposed upon the depositors in other banks, and the publicity given thereby to the business of the depositor and the business of the bank manifestly operates to discriminate against National banks, and in favor of state banks.

The only remedy for this state of affairs, and the only method which can result in the bank making true returns, is, *that its methods of business shall be changed so that its interest periods terminate upon the same day as the periods for which the state seeks to recover the tax upon the average deposits by virtue of the statute and the stipulation.*

Then too, there would seem to be a discrimination against National banks in that its deposits therein, great or small, if interest bearing above two per cent., are subject to a state tax, while only deposits above $2,000 in any of the State savings banks are subject to taxation. It will hardly do to say that this may be done under the guise of exemption from taxation, when it must clearly operate as a discrimination against National banks.

The Act discriminates against stockholders in the defendant's bank. A stockholder of the Clement National Bank would have a right to enjoin the payment of the tax

to the state by the bank as provided in the stipulation because he has a right to have divided upon his stock its proportionate share of the income of the bank derived from what it makes upon the deposits in the savings department as well as its profits in the mercantile department.

Also the Statute makes a discrimination against National banks and in favor of State banks, by making depositors in National banks a class for the purposes of taxation and exempting depositors in State savings banks and trust companies.

(6) *The Statute discriminates against the general taxpayer.*

Owners of choses-in-action or credits, not owed by National banks, are required to pay taxes thereon under the general tax laws at a greater rate.

See general tax laws before cited, and Record p. 17 Art. XIII, fol. 35.

This is a discrimination against them.

We are aware that if we were raising this question, as ordinarily raised by one belonging to the class taxed, this would not be available to us as not belonging to the class discriminated against. But in the case at bar the bank raises the question of unconstitutionality in discussing the validity of the consideration. Anything that effects that it can assert.

In re opinion of the Justices, 79 Atl. 31 (N. H.) (1911), where application was made to the Supreme Court Justices for their opinion on the constitutionality of certain proposed tax legislation, the Justices stated in their opinion that the questions involved were (1) the legal validity of a tax on credits, (2) if such a tax may be imposed, may it be imposed on the value of such property at a rate different from that on

property generally, and (3) may it be imposed at a fixed rate regardless of the sum to be raised. (p. 32.) They held that it was constitutional to tax credits, but that under the constitutional requirement of the State for equality of taxation, *a tax on credits cannot be imposed upon their value at a lower rate than upon property in general.* (pp. 33, 35.)

The proposed law was provided to tax, among other things, money on hand and at interest, "including money deposited in any bank other than a savings bank" within the State. (p. 31.)

The Justices held that their decision of the above question rendered it unnecessary to determine whether the tax could be imposed at a fixed rate. (p. 35.)

The opinion closes with these words:

"We are constrained to answer that in our opinion legislation of the character proposed is for the reasons given beyond the power of the legislature." (p. 35.)

Apparently the valuation was to be made by town and city local officials in the ordinary way and under the general laws.

B THE ACT IS UNCONSTITUTIONAL BECAUSE IT VIOLATES THE FOURTEENTH AMENDMENT IN THAT THE TAXES LEVIED IN PURSUANCE OF SAID ACT, IF ENFORCED, WOULD TAKE THE PROPERTY OF THE DEPOSITORS WITHOUT DUE PROCESS OF LAW.

The Act offends in this respect in the following particulars:

(1) *There was no valid assessment, and none provided for.*

(2) *The tax is assessed, if assessed at all, without proper notice to the depositors.*

(1) *There was no valid assessment of the tax, and none provided for.*

By Section 809 of Chapter 37 of the Public Statutes the tax is provided to be assessed against the individual depositors to the amount of the deposit of each.

This requires ascertaining the names of the individual depositors and the amount of the deposits of each, in order to make an assessment of the tax. A valuation is necessary before the assessment is made. But these facts were never ascertained and the assessment was never completed. None of the reports specified in Sections 804 to 808, inclusive, were ever made or filed; no blanks specified in section 804 were ever applied for or furnished by the commissioner of state taxes to any resident depositors in the defendant's bank; the names of depositors were never reported to said commissioner, not otherwise ascertained by him; no valuation was ever made of the aforesaid individual deposits by any state or other official during the period covered by said stipulation, nor was the amount of any such individual deposits, or the taxes thereon, so ascertained; and no notice of any character was ever given by said commissioner to any depositor in the defendant's bank. (Record 15, Art. 5, fol. 32.)

Nor was there any return filed by the defendant bank. (Record p. 14, Art. 1, fol. 29.)

In laying an ad valorem tax a valuation of the property of each person liable to be taxed is an absolute necessity. A valid assessment is indispensable. This doctrine is as old as the law of taxation.

27 Am. & Eng. Ency. (*2nd Ed.*) 660.
Cooley's Const. Limit. 259.
Com. vs. Del. D. C. Co. 123 Pa. 594, 600.
Com. vs. Lehigh V. R. Co. 104 Pa. 89, 91, 101.

It is only where no valuation is necessary that an assessment without the intervention of assessment officers is valid.

27 *Am. & Eng.* (*2nd Ed.*) 663.
and cases in Note 3.

But it cannot be maintained that the act attempts to assess without a valuation by assessment officers, because the provisions of the Act contained in Sections 804 to 808 inclusive, are for the purpose of ascertaining the names of the depositors and the amounts of their deposits, on which the tax may be assessed under section 809. These sections must be read together, and as a whole they provide for an ascertainment by assessment officers of the names of the individual depositors, the amount or value of their individual deposits, and the amount or rate of the tax based on such valuation.

The assessment is not completed until the return of the depositors or listers have been filed and the amount of each individual deposit ascertained.

Jones vs. Winthrop Savings Bank, 66 Me. 242, 245.

In *Com. v. Lehigh Valley R. Co.*, 104 Pa. 89, the validity of an act seeking to tax individual citizens of Pennsylvania on corporate bonds held by them by requiring the corporations to make returns of the amount of their indebtedness to the auditor general, was raised.

The act was held invalid. The Court said:

> "The tax of a citizen is the result of the rate applied to the value of the property he owns, and he is not taxed until the rate is thus applied, by some legal mode of adjustment. Neither the return of the amount of the indebtedness nor the account settled by the auditor general could be taken as an assessment, for neither

> the corporation nor the auditor general had authority to make it. The return by the corporation of the amount of its indebtedness does not constitute an assessment. Neither does the account settled by the auditor general against the corporation. A valid assessment must precede the collection of the tax." (p. 91.)

The Court further said that, as the act contained no provision for the assessment and valuation, it does not constitute an independent scheme for the taxation of corporate loans, but must be aided by the machinery of another act, that is, assessed by the regular assessing officers. The Court said:

> "If, therefore, the loan is taxable in the hands of resident owners, at its actual value, a legal ascertainment of that value is essential to the assessment of a valid tax." (p. 101.)

It was contended by the State that the corporate officers were themselves the assessors, and the acceptance by the State of their valuation, afforded an official estimate which was equivalent to an actual assessment. But the Court said.:

> "It is sufficient answer to this suggestion, however, that the report which is required is not of the actual value, it is of the amount of the indebtedness, and the reports which were made, although in strict compliance with the act, not only do not purport to be valuations, but expressly state that they are not, and recite that the bonds bear different rates of interest and are of different values. Besides, the tax is in no sense against the corporation but against its creditors as individual citizens of the State, and as we cannot see how or on what principle of the law the report of the corporation as to the amount of its indebtedness could be regarded

> as an assessment, binding upon them, who have been made no parties to it, and have no control over it. There is no community of interest between debtor and creditor; their interests are usually adverse.
>
> Certainly that cannot be regarded as an assessment of an ad valorem tax which is made by persons whose interest is adverse, who are under no official oath or obligation, where the person charged has no notice, no right to interpose for his own protection if he had notice, and no appeal; and when in fact there is no adjudication as to actual value." (p. 102.)

In *State v. Bradford Savings Bank*, 71 Vt. 234, 238, the Court in holding that the act taxing savings banks and trust companies on the average amount of their deposits is a tax upon its franchise and not an ad valorem tax, made the following statement, as one ground of its conclusion, viz.:

> "There is no assessment of property to ascertain its value in comparison with the value of other property in the community."

The assessment must be made by proper officers and cannot be made by the legislature.

Cooley on Taxation, Vol. 1, page 600.

People vs. Hastings, 29 Cal. 449, and other cases cited in Cooley. See also, 1 Cooley 753 and 754.

And in the case at bar, no assessment was attempted by the legislature other than that provided upon the return of the depositors and the listers. And the nominal value of the individual deposits was never ascertained. (Record p. 15, Art. V, fol. 32.)

The Supreme Court of Vermont concedes that the word "assessment" ordinarily implies an official listing of the

persons and property to be taxed, and a valuation of the property of each person as a basis of apportionment; but says that in case of taxes laid upon solvent securities, the nominal or face value of which is identical with the actual value, the assessment may be made by the Legislature without the intervention of assessing officers. (Record p. 35, fol. 67.)

The Vermont Court thereupon cites *Dollar Savings Bank vs. United States*, 19 Wall, 227, *King v. United States*, 99 U. S. 229, *United States v. Erie Ry. Co.*, 107 U. S. 1, *United States v. Phil. Read. R. R. Co.*, 123 U. S. 113, and says that it is evident from these cases that there are some classes of property as to which a legislative assessment is sufficient without a special valuation. The Court then asks:

> "If a resident depositor had made the required returns to the commissioner and lister, and the listers had made their returns to the commissioner, could the depositor have avoided the payment of the tax on the ground that no official judgment had been passed on the value of the deposit?" and answers its inquiry by saying: "It is obvious that the only possible question affecting valuation would be one as to the solvency of the bank. In the taxation of cash there is no distinction between actual value and face value. A credit of a certain amount payable on demand in cash values itself, if the payer is solvent. Under a general law the value of all income-bearing securities for taxing purposes is determined by their amount. A taxpayer cannot reduce his list by valuing his invested funds according to the rate of interest they bear. This statute relates solely to interest-bearing deposits, and income-producing funds are presumably good. Certainly a National bank open for business and paying interest regularly on its deposits may be presumed to be a solvent debtor. A taxpayer holding a note on

> which interest is regularly paid cannot properly return it as due from an insolvent debtor on the ground that the debtor's financial condition is not such as to place him beyond reach of disaster. No more can a depositor in a bank object to an assessment of his credit at its full amount because of the possibility that the bank may prove to be insolvent. In view of these considerations we think the assessment provided by the statute is not invalid because of the failure to provide for an official valuation. (Record p. 35-6, fols. 68-69.)

But is it "obvious that the only possible question affecting valuation would be one as to the solvency of the bank," for the Vermont Supreme Court has decided this point on that assumption?

The tax in this case is provided to be upon the amount of the deposit held by the National bank on the first day of April and October in each year (Section 809). How is that amount to be ascertained?

In the case of the plaintiff in error it has allowed certain depositors, during the period covered by the stipulation, interest at a greater rate than two per cent per annum, payable on the first days of January and July, on such sums so deposited for such calendar months as such deposits have actually remained in its bank prior to said first days of January and July, except that such deposits made during the first days of any month are treated as having been made on the first day of said month; but such deposits bear no interest unless in the bank on January 1st or July 1st. It has allowed certain other depositors who have received certificates of deposit, three per cent per annum for each calendar month during which such deposits were in the bank. (Record pp. 114-15, fol. 31.) In what way is the value or amount of either of these two classes of deposits to be determined on the first day of April or October of each

year? Can the depositor tell its value? In the case of the first class of deposits he can give the amount that was in the bank on January 1st with the interest allowed to that date by getting the figures from the bank, but the real value of the deposit on the first day of April is to be determined by whether interest is to be allowed to that date and that depends upon whether the deposit will remain there until July 1st the next interest period. Does this not call for some official valuation? The value of the other class is to be determined by the amount of interest allowed for each calendar month.

And the rules of the bank as expressed in the contract between the bank and depositor must be known and considered in order to determine the amount of interest earned, and the class of the deposit whether at 3 per cent as in the one class or more as in the other class of deposits. The deposits are at a different rate of interest in plaintiff in error's bank. In other National banks the classes may be more numerous or less numerous, to be determined by an examination or hearing of some sort.

The contracts between the Clement National Bank and its depositors are found on pages 23 to 25 inclusive, of the Record, Exhibits D and E. The bank reserves the right to change the rate of interest.

In *Com. v. Lehigh R. R. Co. supra*, one important consideration with the Court was that the bonds were at a different rate of interest.

(2) *The tax is assessed, if assessed at all without proper notice to the depositors.*

In *Turpin vs. Lemon*, 187 U. S. 51, 57, in the opinion of the Court, laying down the principles to be applied to the

question of due process of law in taxation, Mr. Justice Brown said:

> "Exactly what due process of law requires in the assessment and collection of general taxes has never yet been decided by this Court, although we have had frequent occasion to hold that, in proceedings for the condemnation of land under the laws of eminent domain, or for the imposition of special taxes for local improvements, notice to the owner at some stage of the proceedings, as well as an opportunity to defend, is essential. (Citing *Spencer v. Merchant*, 125 U. S. 345; *Huling v. Kan. Valley Railway*, 130 U. S. 559; *Hagar v. Reclamation District*, 111 U. S. 701; *Paulsen v. Portland*, 149 U. S. 30.) But laws for the assessment and collection of general taxes stand upon a somewhat different footing and are construed with the utmost liberality, sometimes even to the extent of holding that no notice whatever is necessary. Due process of law was well defined by Mr. Justice Field in *Hagar v. Reclamation District*, 111 U. S. 701, in the following words.: 'It is sufficient to observe here that by 'due process' is meant one which following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and whatever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights'."

Referring to other decisions of this Court, Mr. Justice Brown then continued:

"In *McMillen v. Anderson*, 95 U. S. 37, it was held that due process of law did not require that a person should have an opportunity to be present when the tax should be assessed against him, or that the tax should be collected by suit; and in *Kelley v. Pittsburgh*, 104 U. S. 78, that the general system of procedure for the levy and collection of taxes, established in this country, is, within the meaning of the Constitution, due process of law. In *Bell's Gap R. R. v. Pennsylvania*, 134 U. S. 232, 239, it was held that the process of taxation did not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. 'It involves no violation of due process of law, when it is executed in accordance to customary forms and established usages, or in subordination to the principles which underlie them'." (pp. 58-59.)

The case of *McMillen v. Anderson, supra,* involved the validity of a license tax, where all the circumstances of its assessment were declared by Statute, and nothing was intrusted to the discretion of public officers.

In *State Railroad Tax Cases*, 92 U. S. 575, 610, where the ascertainment of the taxable value of railroads was the duty of a board, whose assessment was challenged for the reason the proceeding was not due process of law for want of notice and hearing, Mr. Justice Miller, delivering the opinion of the Court, said:

"This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of anyone before it to assert a right or redress a wrong; and in the business of assessing taxes, this is all that can be reasonably asked."

In the *Kentucky Railroad Tax Cases*, 115 U. S. 321, the Court said there was in fact and law, notice and a hearing. The railroad company was required to make a return to the

auditor of public accounts, showing the length of the road, the average value per mile, and the value of rolling stock and other property. This return was laid by the auditor of public accounts before the board of railroad commissioners, and constituted the matter on which they acted. The commissioners were required by the law to hold public hearings for the purpose of receiving and acting upon these reports and to correct and equalize the same. Anyone interested had the right to be heard, and they were in fact heard. This Court held that if the plaintiffs in error had the constitutional right to hearing, the statute was properly construed as to recognize and respect it and not to deny it. (p. 334.)

The Court further said that the act provided for relief in case of improper valuation, for that the valuation and assessment were not final in the sense that they constitute a charge upon the property, or a liability fixed upon the corporation. Mr. Justice Matthews then continued:

> "That result can be attained and the tax actually collected only by suit, as provided by the fifth section of the Statute, either against the officers of the companies for penalties incurred by a failure to pay the taxes levied, or for the recovery of the taxes themselves, by action in the Circuit Court, or in the Courts having jurisdiction in the counties, for the taxes payable to them respectively."

The Court then said that the case was brought within the decision in *Davidson v. New Orleans*, 96 U. S. 97, 104, where is was held:

> "That, whenever by the laws of a State or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be of the whole State, or of some more limited portion of the community, and those laws pro-

vide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections." (pp. 335, 336.)

In the *Davidson* case this Court said that this proposition was laid down as applicable to the case then before it; but in that case, the Statute provided that before the assessment could be collected or become effectual the tableau of assessment should be filed in the proper court and personal service of notice with reasonable time to object, should be made upon the interested parties. These requirements were complied with, and the party complaining in that suit appeared and had a full and fair hearing. This Court thereupon said:

"If this be not due process of law, then the words have no definite meaning as used in the Constitution." (pp. 105-106.)

Continuing with the opinion of this Court in the *Kentucky Railroad Tax Cases*, supra, with reference to the above proposition laid down on the Davidson case, the Court said:

"And this is the principle that was followed in the subsequent case of *Hagar v. Reclamation District*, 111 U. S. 701. In that case, the Statute of California, which conferred the jurisdiction, *authorized any defense, going either to the validity or the amount of the tax assessed, to be pleaded. What inquiries may be permitted in such cases, of course, is a matter, that depends upon the particular provisions of the law of the jurisdiction.* In the absence of such provisions, and as a principal of general jurisprudence, it is safe to say, that any

> defense is admissible which establishes the illegality of the proceeding resulting in the alleged assessment, whether because it is in violation of the local law which is relied on as conferring the authority upon which it is based, or because it constitutes a denial of a right secured to tax a party complaining by the Constitution of the United States. The judgments now under review were rendered in just such actions, so that we can not escape the conclusion that there is no ground for the plaintiffs in error to contend that they have not been rendered without due process of law." (p. 336.)

But in the statute under consideration in that case, the party was entitled to and had a hearing at a public session, fixed by the Statute, of the board having authority to correct and equalize the valuations.

The cases cited furnish illustrations of the application of the due process of law rule, and state the principles laid down by this Court. Applying them to the case at bar can it be said that, if the Statute in question should be enforced against the depositors, it would result in the taking of their property without due process of law? We maintain that it would so result.

Section 804 provides for a report by the depositor or to the commissioner of taxes, on the first day of April and October, of the amount of the deposit and the name of the bank. Sections 805 and 806 provide for a report by the depositor to the listers on the first day of April, in the regular tax inventories used for general taxation, the name of the bank, and the amount of the deposit with all accrued interest. Section 807 requires the listers to report to the commissioner of taxes the names of persons having deposits of the character in question in National banks, the names of the bank and the amount of the deposits.

The statute undertakes to make the assessment take

effect upon the filing of these reports; but a valuation is necessary; the amount of accrued interest must be determined, as we argued *supra* in discussing the question of valuation. Section 806 requires the accrued interest to be included. There is no provision in the statute for any hearing as to value and no notice of any hearing to the depositor. In the general tax laws the owner of choses in action has a hearing before the listers and an appeal to the board of civil authority before the valuation becomes final. In this statute there is no independent scheme of taxation provided, such as is required to preserve constitutional rights. A special tax law must make such provision for an independent scheme.

> *Commonwealth v. Lehigh Valley R. R. Co.*, 104 *Pa.* 89, 101.

But does the provision in Section 811 provide sufficient notice and opportunity to defend? The provision is:

> "Such tax and forfeiture may be recovered in an action on this Statute commenced by the commissioner of State taxes in the name of the State in any county, municipal or City Court."

That is all there is to the provision. There are no provisions for defenses and nothing said about defenses or pleas.

The Supreme Court of Vermont, considering this feature of the case said:

> "Statutes sometimes and perhaps generally provide in terms for the making of defenses; but, as said in the case last cited, (*Kentucky Railroad Tax Cases*, 115 U. S. 321, 336) 'in the absence of such provisions, and as a principle of general jurisprudence, it is safe to say that any defense is admissible which establishes the illegality of the proceeding resulting in the alleged

> assessment, whether because it is in violation of the local law which is relied on as conferring the authority * * * * or because it constitutes a denial of a right secured to the party complaining by the Constitution of the United States." (Record p. 40, fol. 78.)

In that case the statute provided for collection of the taxes by actions in the courts, without specifying what defenses could be interposed. (p. 324). The provision in that respect was quite as incomplete as in the case at bar. But Section 1 of the Kentucky statute provided for a return by the railroad companies of the amount and value of its taxable property, Section 3 for a public hearing by a board of equalization on a day named, for the purpose of correcting and equalizing valuations, and Section 4 provided for notice to the railroad companies of the amount of its assessment. All these provisions should be considered together in construing the decision of the Court in respect to notice and due process. In the case at bar, there is absolutely no provision for the protection of the depositor, unless a complete defense is found in the section providing for the recovery of the tax in an action upon the Statute.

The Vermont Court cites *Winona etc. Co. v. Minnesota*, 159 U. S. 526, on the proposition that tax proceedings are within the requirement of due process if the taxpayer has an opportunity to contest the validity or amount of the tax in proceedings had for its collection. *But in that case the statute expressly provided for defenses*, and among other provisions was one that,

> "It is a full defense that the taxes have been paid or that the property is not subject to taxation." (p. 535.)

In *Hagar v. Reclamation District*, 111 U. S. 701, Mr. Justice Field said that of the different kind of taxes which a

State may impose, there is a vast number of which no notice can be or need be given, such as poll taxes, license taxes (not dependent on the extent of business), and specific taxes on things, persons or occupations.

> "In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. (p. 709.) * * * * * * * But when a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose upon such evidences as they may obtain, a different principle comes in. The officers in estimating the value act judicially; and in most of the States provision is made for the correction of errors committed by them through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessments.
>
> The law in prescribing the time when such complaints will be heard, gives all the notice required and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquents' property, is due process of law." (pp. 709-710.)

FOURTH POINT.

The judgment of the Supreme Court of Vermont should be reversed.

MAXWELL EVARTS,
MARVELLE C. WEBBER.
Of Counsel for Plaintiff in Error.

APPENDIX.

The Statute.

CHAPTER 37.

TAXATION OF NATIONAL BANK DEPOSITS.

Sec. 804. **Depositor's report to commissioner.** Every person having, on the first day of April and October, an interest bearing deposit in a national bank in this state, shall, except as otherwise provided by this chapter, within twenty days thereafter, report the amount thereof and the name of such bank to the commissioner of state taxes, on blanks prepared and furnished by him to such depositor on application therefor.

Sec. 805. **Depositors' report to listers.** Every resident of this state so having an interest bearing deposit in a national bank in this state shall annually, except as otherwise provided in this chapter, report to the listers of the town wherein he resides, the names of all banks located in this state wherein he then has or has had any such deposits during the year next preceding the first day of April in the year wherein such report is made, and the amount of such deposits.

Sec. 806. **Interrogatories in inventories.** The secretary of state shall incorporate into the tax inventory interrogatories so framed as to require the person subscribing to the same to state in writing and under oath whether or not he then has or has had during the year next preceding the first day of such April, any such deposits; and, if such interrogatories are answered in the affirmative, he shall

also state the name of such bank and the amount of such deposit with all accrued interest.

Sec. 807. **Reports by listers.** The listers in every town shall, on or before the tenth day of May, upon blanks to be furnished by the commissioner of state taxes, report the names of all persons whose inventories show that they had in a national bank in this state on the first day of the preceding April, deposits of the character and kind described in the third preceding section, together with the amount of each individual deposit so held on such first day of April and the name of the bank holding such deposit.

Sec. 808. **Reports filed inspection.** Such reports shall be kept on file by said commissioner for three years from and after the dates on which the taxes based thereon became due and payable to the state. Such reports shall not be subject to the inspection of any person other than said commissioner and the employes in his office, the attorney general, and the state's attorney of the county wherein such bank has its principal place of business or said depositor, if a resident of this state, has his domicile. Any information contained in such reports shall not be disclosed by any person authorized to examine the same, except by the direction of a court of competent jurisdiction.

Sec. 809. **Assessment of tax; payment.** Every person so having a deposit in a national bank as aforesaid shall semi-annually, except as otherwise provided by this chapter, pay a tax to the state, which is hereby assessed at the rate of seven-twentieths of one per cent semi-annually upon the amount of such deposit so held by such national bank on the first day of April and October; and no deduction therefrom shall be made on account of any exemption. The taxes imposed by this section shall be paid to the state treasurer semi-annually on or before the last

day of May and November next following the dates whereon the reports provided for in the fourth preceding section are required to be made.

Sec. 810. **Exempt from other taxes.** No other tax shall be assessed on such deposits in national banks, nor against the depositors on account thereof.

Sec. 811. **Penalty.** A depositor who wilfully fails to make returns or pay the taxes provided by this chapter shall forfeit ten per cent of such deposit to the use of the state for each month's delay in filing such return. Such tax and forfeiture may be recovered in an action on this statute commenced by the commissioner of state taxes in the name of the state, in any county, municipal or city court.

Sec. 812. **Trustee process.** A person having any of the moneys, goods, chattels, effects, rights or credits of said depositor in his possession may be summoned as trustee in any action instituted under the preceding section, notwithstanding that the amount of such tax or the amount in his hands may be less than ten dollars.

Sec. 813. **Waiver of penalty.** If the commissioner of state taxes or the court wherein such action is pending for the recovery of such tax or forfeiture becomes satisfied that such failure was not wilful on the part of the depositor, said commissioner or said court may, in its discretion, waive any part or all of such penalty.

Sec. 814. **Bank may elect to pay.** If a national bank in this state so elects it may pay to the state all taxes provided by this chapter; and it shall be lawful for such bank to deduct such taxes so paid from the interest or deposits then or thereafter held by it belonging to the person from whom such tax became due.

Sec. 815. **Same; stipulation.** If a national bank elects to so pay such taxes to the state and to make returns

as hereinafter provided, it shall semi-annually, on or before the first day of April and October, file with the commissioner of state taxes a stipulation setting forth such fact; and thereupon such bank shall become liable to the state for such tax for the six months named in such stipulation and to make returns as hereinafter provided; and no depositor in such bank shall be required to make the returns hereinbefore specified covering the six months' period for which such stipulation was filed.

Sec. 816. **Commissioner's certificate to bank.** Upon such stipulation being filed, said commissioner shall issue in duplicate to such bank a certificate showing that it has filed such stipulation.

Sec. 817. **Bank's liability.** Every bank filing such stipulation shall thereupon become liable to the state for the amount of such tax of seven-twentieths of one per cent of the average amount of such deposits held by such bank during the six months beginning with the first day of April and October respectively, for which such stipulation was filed.

Sec. 818. **Bank's return.** If such bank, on or before the first day of April, files a stipulation as hereinbefore provided, it shall, on or before the thirty-first day of the following October, file a return with the state treasurer and commissioner of state taxes, verified by the oath of its president, cashier, or one of its directors, showing the average amount of such deposits for the six months ending the thirtieth day of September in that year, and shall pay to the state treasurer the amount of such semi-annual tax. In case such bank, on or before the first day of October, files a like stipulation, it shall, on or before the thirtieth day of the following April, file a like return with the first named officers, showing the average amount of such de-

posits for the six months ending with the thirty-first day of March next preceding the making of such return, and shall, in like manner, pay such taxes.

Sec. 819. **Exemptions.** The provisions of this chapter shall not apply to municipalities; nor to corporations organized solely for charitable, educational or religious purposes; nor to railroad, insurance, guaranty, express, telegraph, telephone, steamboat, car, transportation, sleeping car, parlor car, mortgage, loan or investment companies; nor to savings banks, trust companies, and savings bank and trust companies which have interest bearing deposits in national banks; nor to national banks having an interest bearing deposit in another national bank; nor to any person having any sum of money on deposit in a national bank whereon interest not exceeding the rate of two per cent per annum is paid or allowed him by such national bank.

Sec. 820. **Exemptions restricted.** Nothing in this chapter shall be construed as exempting from taxation any deposit in any national bank, except as hereinbefore provided.

The original chapter was act No. 41 of the laws of 1906, entitled, "An Act to Assess a State Tax on Interest-bearing Deposits in National Banks."

Exhibit "A" **Stipulation.** (Record p. 20.)

STATE OF VERMONT.

The Clement National Bank, whose banking house is located at Rutland, in the State of Vermont for the consideration hereinafter named, hereby stipulates and agrees with the State of Vermont that on or before the thirtieth day of April, 1909, it will make sworn returns to the State Treasurer and Commissioner of State Taxes showing the

average amount of all deposits held by it during the six months beginning with the first day of October, 1908, whereon the rate of interest paid or allowed by said bank to the depositors thereof exceeds two per cent per annum; and that on or before the thirtieth day of April, 1909, it will pay to the State Treasurer a tax of seven-twentieths of one per cent of the average amount of all such deposits so held by it.

This stipulation is made and is to be filed with said Commissioner in consideration and for the purpose of carrying out the provisions of the statutes of Vermont which provide that upon the making and filing hereof as aforesaid no depositor having an interest bearing deposit or deposits in said bank whereon the rate of interest paid or allowed by said bank exceeds two per cent per annum shall be required on or before the 20th day of October, 1908, to make returns to the State Treasurer and Commissioner of State Taxes showing the amount of such deposit or deposits in said bank on the first day of October, 1908; and that no such depositor shall be required to pay to the state Treasurer on or before the thirtieth day of November, 1908, a tax of seven-twentieths of one per cent of the amount of such interest bearing deposit or deposits so held by said bank on the first day of October, 1908.

This stipulation is also made and is to be filed as aforesaid for the purpose of obtaining from said Commissioner as the law provides a certificate in duplicate setting forth that the same has been filed and of showing that said bank has elected to pay and will pay to the State Treasurer on or before the thiriteth day of April, 1909, a tax of seven-twentieths of one per cent of the average amount of all such deposits held by said bank during the six months beginning with the first day of October, 1908, on account of which the

depositors thereof shall be by said bank paid or allowed interest exceeding the rate of two per cent per annum.

IN WITNESS WHEREOF said bank has on this 30th day of September, 1908, at Rutland, in the State of Vermont caused its corporate name to be hereunto affixed by its cashier duly empowered so to do by vote of said bank.

CLEMENT NATIONAL BANK,
Rutland, Vt.
By C. H. Harrison, Cashier.

Endorsed: Received October 1, 1908, J. E. Cushman, Commissioner of State Taxes.

Exhibit "B" **Certificate.** (Record p. 21.)

STATE OF VERMONT.

OFFICE OF THE COMMISSIONER OF STATE TAXES.

This certifies that the Clement National Bank has this day filed with the Commissioner of State Taxes a stipulation that said bank has elected to pay and will pay to the State of Vermont the tax required by law upon all interest bearing deposits held by it during the six months beginning October 1, 1908, whereon the rate of interest exceeds two per cent per annum; and that it will file with the State Treasurer and Commissioner of State Taxes sworn returns showing the average amount of such deposits held by it during said period.

Depositors having deposits in said bank whereon the rate of interest exceeds two per cent per annum, are therefore not required to make returns thereof to the State Treasurer or Commissioner of State Taxes.

Given under my hand at Burlington, Vermont, this first day of October, 1908.

J. E. CUSHMAN,
Commissioner of State Taxes.

Exhibit "C" **Return, Form of.** (Record p. 21.)

STATE OF VERMONT.

Statement of the located at Vermont, for the semi-annual period ending March 31, 1909.

The following answers to the interrogatories herein contained are true and correct statements touching the above named corporation, and are made in compliance with the provisions of a stipulation filed in the office of the Commissioner of State Taxes on the day of 1908.

1. What was the average amount of all deposits of whatever nature, whether evidenced by certificate of deposit, pass books or otherwise held by the National bank in whose behalf this return is made during the six months ending with the last day of March, 1909, on account of which the depositors thereof have heretofore been paid or allowed or shall hereafter be paid or allowed interest exceeding the rate of two per cent per annum,—said average unless otherwise indicated to be computed by using the daily amounts of such deposits.

Average amount held in October, 1908, $————
November, ————
December, ————
January, 1909, ————
February, ————
March, ————
Total, ————
Average, $————

2. What was the average amount of all such interest bearing deposits computed as stated in the last preceding

question held by said national bank and deposited by municipalities, corporations or societies organized solely for charitable, educational or religious purposes; railroad, insurance, guaranty, express, telegraph, telephone, steamboat, car, transportation, sleeping car and parlor car companies; savings banks, trust companies, savings bank and trust companies; mortgage, loan or investment companies; and other national banks?

Average amount held in October, 1908, $_____

November, _____

December, _____

January, 1909, _____

February, _____

March, _____

Total, _____

Average, $_____

Balance subject to taxation $_____

Tax at 7-20 of 1% for six months $_____

(Signature) _____

(Official Character) _____

I _____ of _____ in the County of _____ and State of Vermont, on oath depose and say that I am the _____ of the national bank in whose behalf the foregoing return by me subscribed is made; that the answers to the questions therein contained are true and correct; that the average amount set down in answer to the first question therein contained is the average amount of all deposits, whereon said bank has paid or allowed interest in excess of the rate of 2 per cent per annum, held by said bank during the respective periods therein mentioned; and that the answer to question

two contains no deposits except such as draw interest at the rate last hereon mentioned.

STATE OF VERMONT,
County, ss.

At in said county on this
day of 1909, personally appeared
and made solemn oath
that the above statement and affidavit by him signed is true.

Before me,

H. 584.

(Introduced by Committee on Ways and Means, read the first and second times and under the rule ordered to lie and be printed.)

AN ACT TO AMEND CERTAIN SECTIONS OF THE PUBLIC STATUTES, AS AMENDED, RELATING TO THE TAXATION OF DEPOSITS IN SAVINGS INSTITUTIONS AND NATIONAL BANKS.

It is hereby enacted by the General Assembly of the State of Vermont:

Section 1. Section 744 of the Public Statutes, as amended by No. 35 of the acts of 1910, is hereby amended so as to read as follows:

Sec. 744. A domestic savings bank or savings institution doing business herein shall annually pay a tax to the state, which is hereby assessed at the rate of eight-tenths of one per cent upon the average amount of its

deposits and accumulations, after deducting therefrom the average amount not exceeding ten per cent of its assets invested in United States government bonds, and the average amount of the assessed valuation of the real estate owned by such corporation.

Sec. 2. Section 745 of the Public Statutes, as amended by No. 35 of the acts of 1910, is hereby amended so as to read as follows:

Sec. 745. A domestic trust company or savings bank and trust company doing business herein shall annually pay a tax to the state, which is hereby assessed at the rate of eight-tenths of one per cent upon the average amount of its deposits, including money or securities received as trustee under order of court, or otherwise, after deducting therefrom the average amount, not exceeding ten per cent of its assets invested in United States government bonds.

Sec. 3. Section 809 of the Public Statutes is hereby amended so as to read as follows:

Sec. 809. Every person so having a deposit in a national bank as aforesaid shall semi-annually, except as otherwise provided by this chapter, pay a tax to the state, which is hereby assessed at the rate of eight-twentieths of one per cent semi-annually upon the amount of such deposit so held by such national bank on the first day of April and October; and no deduction therefrom shall be made on account of any exemption. The taxes imposed by this section shall be paid to the state treasurer semi-annually on or before the last days of May and November next following the dates whereon the reports provided for in the fourth preceding section are required to be made.

Sec. 4. Section 817 of the Public Statutes, as amended by No. 57 of the acts of 1910, is hereby amended so as to read as follows:

Sec. 817. Every bank filing such stipulation shall thereupon become liable to the state to make returns and pay eight-twentieths of one per cent of the average amount of such deposits held by such bank, during each six months period beginning with the first day of April and October respectively in which such stipulation remains in force.

Sec. 5. The first semi-annual period to which the tax assessed by sections 1 and 2 of this act shall apply, shall be the period beginning on the first day of July, 1913; and the first semi-annual period to which the tax assessed by sections 3 and 4 of this act shall apply, shall be the period beginning on the first day of April, 1913; and nothing in this act shall affect any tax accrued or accruing prior to such dates respectively nor any preceding for the assessment or collection of the same.

(Box 388)
SUPREME COURT, U. S.
FILED
APR 2 1912
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States

OCTOBER TERM, 1911.

No. [redacted]

THE CLEMENT NATIONAL BANK,
PLAINTIFF IN ERROR,

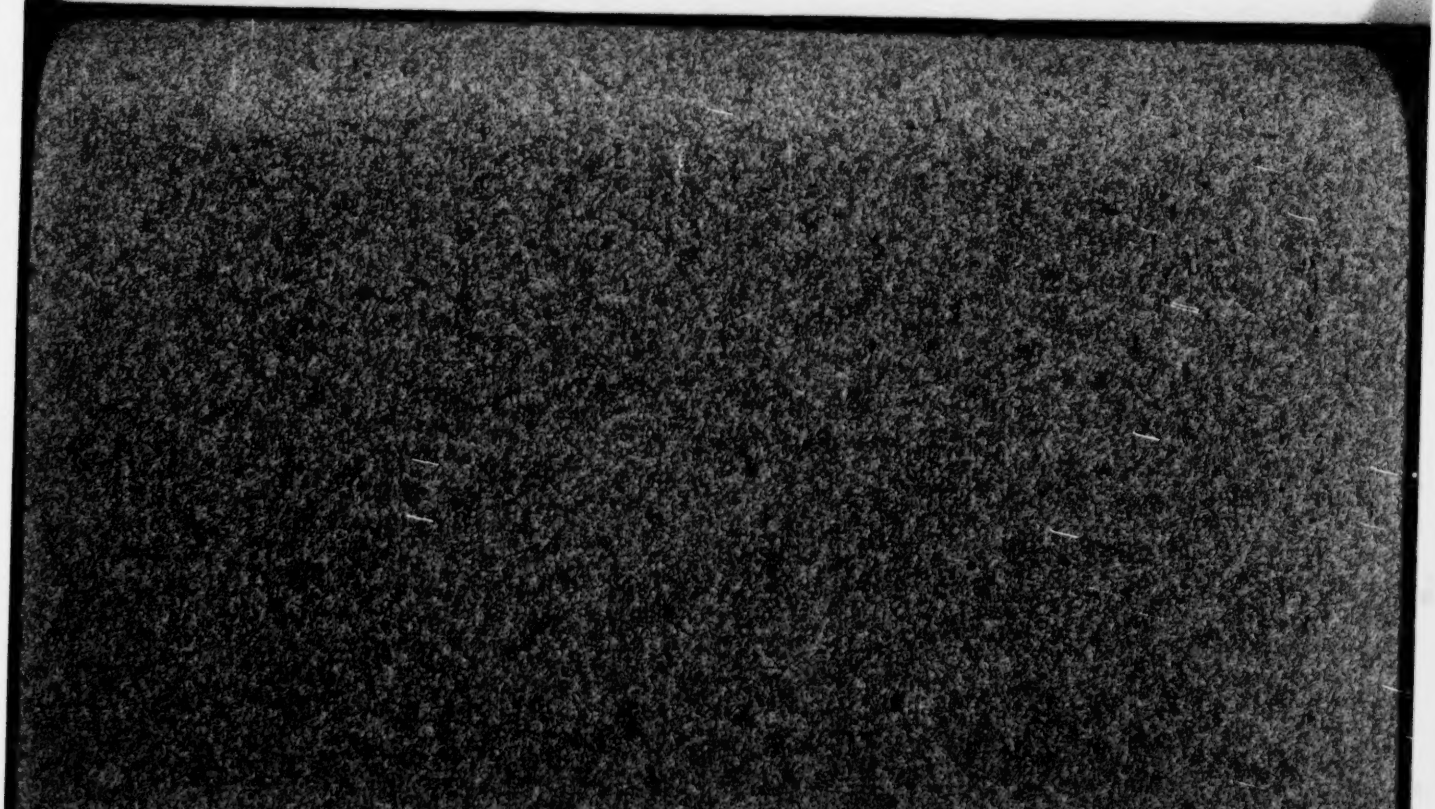
vs.

THE STATE OF VERMONT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

NOTES OF ARGUMENT FOR PLAINTIFF IN ERROR.

MAXWELL EVARTS,
Of Counsel for Plaintiff in Error.



Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 266.

THE CLEMENT NATIONAL BANK,
Plaintiff-in-Error,

VERSUS

THE STATE OF VERMONT.

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

NOTES OF ARGUMENT FOR PLAINTIFF-IN-ERROR.

The Clement National Bank is a federal instrumentality and in the course of its business has established a department for the deposit of savings.

No law of the State of Vermont can affect or impair the efficiency of any federal instrumentality to perform the functions for which it was created. Any law of Vermont which attempts to do so is unconstitutional.

The great question in this case is whether the law under consideration does impair the efficiency of the plaintiff-in-error to perform a part of its functions as a National Bank.

The State of Vermont believing that the Savings Department of National Banks offered a new and fruitful field of taxation has levied a tax on the savings depositors in National Banks *as such*.

The depositors in the State Savings Banks and Trust Companies are not required to pay a tax upon their deposits, but the Savings Bank or Trust Company itself is taxed, and the depositor therein *as such*, is not.

Under such circumstances it necessarily follows that a depositor in the Savings Department of a National Bank if compelled to pay a tax on his deposit will withdraw it and place it in some State Savings Bank. Of course no depositor in the Savings Department of a National Bank who receives three and a half or four per cent. interest a year and is obliged to pay a tax of seven-tenths of one per cent. will continue to deposit in such bank, when he can take his money across the street and place it in a State Savings Bank where he will receive the same rate of interest on his deposit without any deduction for taxes. The result, therefore, of this tax laid only upon the depositors in the Savings Department of National Banks *as such* is that it tends to destroy the ability of the National Bank to carry on its Savings Department, and it certainly impairs its efficiency as an instrumentality of the federal government. In other words, the Savings Department of the National Banks located in Vermont will be closed for want of deposits if this tax is collected from the depositors.

Of course if a tax of seven-tenths of one per cent. can be levied the rate can be increased, and at the last

session of the Vermont Legislature a bill was introduced increasing the tax, but it was not passed. It is to be noticed in the title of this bill that the Legislature did not hesitate to describe the law which we are now discussing as a taxation of "deposits in * * * national banks."* It is plain that the tax could be made so burdensome that not only no depositor would be able to pay it but no bank could afford to elect the right to pay the tax.

The evil therefore of this law is its attempt to tax depositors in National Banks *as such*, and to thereby impose indirectly a tax upon National Banks, which could not be done directly. No one contends that the State of Vermont has not the right to include in its taxation of a person's property the amount which he may have on deposit in the Savings Department of a National Bank. Against such a tax, coming under the general tax law, the depositor at the time this action was brought would have had a right to offset his debts, but to single out from all the people in the State of Vermont, for taxation without the right of offset, those who have deposits in the Savings Department of National Banks, and to require such persons because they were depositors in the Savings Department of National Banks to pay a tax twice a year to the State of Vermont, when every other person in the State is only required to pay taxes once a year is certainly the imposition of a tax by the State which tends to affect and

*House Bill No. 584.—An act to amend certain sections of the Public Statutes, as amended, relating to the taxation of deposits in savings institutions and national banks, introduced by Committee on Ways and Means in 1912.

impair the ability of the Clement National Bank to perform its functions as a federal agency.

It makes no difference what the law is, or what its terms are, if the effect of the law is to impair the efficiency of a federal instrumentality to perform the functions for which it was created. If it is clear from its terms that the result of the statute is to make it more difficult for National Banks to continue their Savings Department then the law is unconstitutional, and the State cannot make such a law constitutional, by providing that the National Bank may, if it chooses, elect to pay this tax itself, or to speak more correctly, to pay another tax in place of the one levied on the depositors as National Bank depositors. An examination of the statute will show that the tax which the Bank is given the election to pay is not the tax which is imposed upon the depositors, but is an entirely different tax, based upon the amount of average deposits in the Bank during the preceding six months. It needs no elaboration to show that a tax on depositors at a certain date is a very different thing from a tax upon the average amount of deposits in the Bank during the preceding six months.

Whether the depositors pay this tax or whether the Bank elects to pay the tax in an attempt to keep its Savings Department alive the result is the same, viz: that this legislation affects this National Bank and impairs its efficiency to perform the functions for which it was created. The Savings Departments of National Banks located in the State of Vermont can be destroyed by the State if the power given by this law stands and the law is held to be constitutional. If the depositor is

compelled to pay the tax he of course will withdraw his savings from the National Bank. If the Bank should elect or desire to elect to pay a tax, the State has the power to impose such a heavy tax that the Bank could not afford to pay both the interest to the depositor and the tax to the State. In either case the power of the Clement National Bank to perform its functions as a federal instrumentality is impaired and so far as its Savings Department is concerned the State has the power to destroy it.

In addition to the tax under this law impairing the efficiency of the Clement Bank as a federal instrumentality it is also clear that the National Bank as a Bank is discriminated against by this legislation in that no tax is imposed by the State upon the depositors in any State Savings Bank or Trust Company of Vermont *as such*. Further than that, the Bank is discriminated against as a Bank in that its depositors *as such* are required to pay a tax twice a year. To pay a tax once a year is regarded as a burden. To select out of all the depositors in the Banks and Trust Companies throughout the whole State of Vermont only the depositors in the Savings Department of National Banks located in the State of Vermont and require them to pay a tax twice a year makes the tax unendurable and creates a very serious discrimination as against National Banks. Certainly no National Bank can hope to successfully compete for business in its Savings Department against a State Savings Bank or Trust Company when depositors in the former are taxed *as such* while no tax is levied upon the depositors in the latter. The law or the principle embodied in the

law is or certainly may easily become a serious prejudice to National Banks in the conduct of their business.

We, therefore, respectfully submit that this law is unconstitutional,

FIRST: Because its necessary effect is to impair the efficiency of a federal instrumentality to perform the functions for which it was created.

SECOND: For the reason that depositors in the Savings Department of National Banks are alone selected for taxation from all of the depositors in the Banks and Trust Companies of Vermont, and that such arbitrary selection for taxation is a discrimination against the National Banks and prejudicial to them and in favor of the State Banks and is therefore in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States providing that,

> "no State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

MAXWELL EVARTS,
Of Counsel for Plaintiff in Error.

[Total]

15

Supreme Court, U.S.
FILED.
APR 17 1913
JAMES H. McKENNEY
Clerk

Supreme Court of the United States

OCTOBER TERM, 1912

No. 29

THE CLEMENT NATIONAL BANK,
Plaintiff in Error.

v.

THE STATE OF VERMONT,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

Brief for Defendant in Error.

CLARKE C. FITTS,
HALE K. DARLING,
of Counsel for Defendant in Error.

SUBJECT INDEX.

page

Action, Nature of 3, 28
Additional statement 1
Advertisement by bank 15
Assessment 87, 93
Bank's points grouped 4
Cases, Table of ..... iii, iv, v
Classification 69, 73
Consideration, generally 25
Contracts not impaired 57
Controverted facts 2
Depositors cannot complain 74, 81
Discriminations 69, 73, 78, 80, 83, 84, 86
Due process 87
Duress 52
Equal protection of laws 73
Federal agency 34
Federal functions of National banks 3, 4
Federal questions *not* raised 5, 26, 49, 51, 55, 86
Finality of state court's decision 5, 8, 26, 51, 55, 56
Fourteenth Amendment 68
Franchise tax not imposed 43
Impairment of Contract 57
Legal obligation of stipulation 25
National bank's Federal functions 34
National bank's powers 14, 20, 76
Nature of action 3
Nature of tax 9
Notice 93
Ratification 54
Right of State to tax 29
Recoupment 46

page

State Court's decision—Finality of 5, 8, 26, 51, 55, 56
State might collect through bank 61
Statement of case 1
State's right to tax 29
State Statutes 97
Table of cases ..... iii, iv, v
Tax is on depositors only 10, 11, 17
Tax returns required of individuals by state law 38
Tax, use of word not controlling 12, 27, 34
Ultra vires 12, 13

A LIST OF THE CASES CITED IN THIS BRIEF.

Name of Case	Report	Pages in Brief
Aberdeen Bank v. Chehalis County,	166 U. S. 440	51
Adams Express Co. v. Kentucky,	166 U. S. 171	28
Albany County v. Stanley,	105 U. S. 305	57
Allen v. Drew,	44 Vt. 174	70
Assaria State Bank v. Dolley,	219 U. S. 121	66
Atchison, etc., R. Co. v. Matthews,	174 U. S. 96	71, 73
Ballard v. Burton,	64 Vt. 387	26
Bellows v. Sowles,	55 Vt. 391	26
Bell's Gap Railroad Co. v. Pennsylvania,	134 U. S. 252	64, 68, 73, 74, 89, 92
Blake v. Peck,	11 Vt. 483	26
Boston v. Beal,	51 Fed. R. 306	51
Brainard v. Van Dyke,	71 Vt. 359	55
Bucher v. Cheshire R. Co.,	125 U. S. 555	7
Capital Bank v. Cadiz Bank,	172 U. S. 425	79
Carstairs v. Cochran,	193 U. S. 10, 16	65
Carthage v. First Nat. Bank,	71 Mo. 509	31
Carver v. United States,	111 U. S. 609	55
Central Transp. Co. v. Pullman's Palace Car Co.,	139 U. S. 24	21
Chicago, etc., Co. v. Minnesota,	134 U. S. 418	6
Churchill v. Bradley,	58 Vt. 403	27
Clement v. Buckley Mercantile Co. (Mich.),	137 N. W. 657	55
Collins v. Texas,	223 U. S. 288	57
Com. v. Peoples etc., Savings Bank,	5 Allen 428	70
Connolly v. Bouck (C. C. A.),	174 Fed. R. 312	55
Consumers Ice Co. v. Hatch,	224 U. S. 148	60

Name of Case	Report	Pages in Brief
Davis v. Elmira Sav. Bank,	161 U. S. 275, 283	30, 32
Dollar Savings Bank v. United States,	19 Wall. 227	91
Dolley v. Abilene National Bank,	179 Fed. R. 461	39, 53
Dorwin v. Smith,	35 Vt. 69	27
Farmers and Traders Bank v. Hoffman,	93 Iowa 119	51
Faust v. Building Ass'n,	84 Md. 186	91
First Nat. Bank v. Chapman,	173 U. S. 205	70
First Nat. Bank of Carlisle v. Graham,	100 U. S. 699	20
First Nat. Bank v. Nat. Exch. Bank,	92 U. S. 122	13, 20
First Nat. Bank v. Strang,	138 Ill. 347	20
Gaar, Scott & Co. v. Shannon,	223 U. S. 468	52, 56
Galusha v. Sherman,	105 Wis. 263, 47 L. R. A. 417	55
George v. Wallace (C. C. A.),	135 Fed. Rep. 286	21
Giddings v. Giddings,	51 Vt. 227	27
Giozza v. Tiernan,	148 U. S. 657	71
Godfrey v. Bennington,	75 Vt. 350	93
Grand Trunk R. Co. v. Ives,	144 U. S. 408	8
Green Bay etc. Co. v. Patten Paper Co.,	172 U. S. 58	79
Gross v. Partenheimer,	159 Pa. St. 556	92
Hagar v. Reclamation Dist.,	111 U. S. 701	94
Haight v. Pittsburg, etc. R. Co.,	6 Wall. 15	65
Howe Machine Co. v. Gage,	100 U. S. 676	6
Illinois Cent. R. Co. v. Illinois,	163 U. S. 142	5, 6
Interstate Nat. Bank v. Ferguson,	48 Kan. 732	20
Kentucky Railroad Tax Cases,	115 U. S. 321	72, 94
Kentucky Union Co. v. Kentucky,	219 U. S. 151	95
Kerfoot v. Farmers & M. Bank,	218 U. S. 285	4, 22
King v. United States,	99 U. S. 229	91

Name of Case	Report	Pages in Brief
Kirtland v. Hotchkiss,	100 U. S. 491	29
Larabee v. Dolley,	175 Fed. R. 365	55
Leffingwell v. Warren,	2 Black 599 (67 U. S. 261)	6
Lewis v. Monson,	151 U. S. 545	9
Lionberger v. Rowse,	9 Wall. 468	63
Logan County Nat. Bank v. Townsend,	139 U. S. 67	19
Louisville & N. R. Co. vs. Louisville,	166 U. S. 709	79
Lull v. Anamosa Nat. Bank,	110 Iowa 537	21
Macon v. First Nat. Bank,	59 Ga. 648	31
Magoun v. Illinois Trust & Sav. Bank,	170 U. S. 283	71
Martin v. West,	222 U. S. 191	6
Maxwell v. Griswold,	51 U. S. (10 How.) 242	52
McClellan v. Chipman,	164 U. S. 347	31, 32, 86
Mercantile, etc. Bank v. Mayor, etc.,	121 U. S. 138	30, 34
Merchant's etc. Bank v. Pennsylvania,	167 U. S. 461	8, 63, 71
Michigan C. R. Co. v. Powers,	201 U. S. 245	77
Miller v. Texas,	153 U. S. 535	79
Missouri Pac. R. Co. v. Nebraska,	164 U. S. 403	5
National Bank v. Commonwealth,	9 Wall. 353	31, 42, 62
National Bank v. Graham,	100 U. S. 699	20
New Hampshire Justices, opinion of,	79 Atl. 31	86 87
New Orleans v. Houstan,	119 U. S. 265	51
Noble State Bank v. Haskell,	219 U. S. 104	66
Owensboro Nat. Bank v. Owensboro,	173 U. S. 664	30, 31, 43
Oxley Stave Co. v. Butler County,	166 U. S. 648	79
Pacific Express Co. v. Siebert,	142 U. S. 339	71
Pattison v. Syracuse Nat. Bank,	80 N. Y. 82	19, 20

Name of Case	Report	Pages in Brief
Pittsburg v. First Nat. Bank, 55 Pa. 45		31
Provident Institution for Savings v. Malone, 221 U. S. 660		60
Rankin v. Emigh, 218 U. S. 27		4
Red River Valley Nat. Bank v. Craig, 181 U. S. 548		57
Robertson v. Frank Brothers Co., 132 U. S. 17		52
Rosenblatt v. Johnston, 104 U. S. 462		30
Rutland R. Co. v. Central Vt. R. Co., 63 Vt. 1		58
Savings etc. Ass'n v. Multnomah Co., 169 U. S. 421		71
Schee v. McQuilken, 59 Ind. 269		55
Schofield v. State Nat. Bank, 97 Fed. Rep. 282		20
Schurz v. Cook, 148 U. S. 397		8
Second Nat. Bank v. Caldwell, 13 Fed. R. 429		31
Seeberger v. McCormick, 175 U. S. 274		26
Society for Savings v. Coite, 6 Wall. 594		33
Soon Hing v. Crowley, 113 U. S. 703		83
St. Albans v. National Car Co., 57 Vt. 68		66 ~~64~~
Stapylton v. Thaggard, 91 Fed. R. 93		51
State v. Franklin County Sav. Bank, etc., 74 Vt. 246		44
State v. Peoples Nat. Bank, 75 N. H. 27		13, 60
State v. Weaver, 100 U. S. 539		33
Swift v. United States, 111 U. S. 22		52
Sykes v. Canton First Nat. Bank, 2 S. D. 242		20
Tappan v. Merchants Nat. Bank, 19 Wall. 490		70
Third Nat. Bank v. Stone, 174 U. S. 432		31
Tullis v. Lake Erie etc. R. Co., 175 U. S. 348		8
Turpin v. Lemon, 187 U. S. 51		57
Union Nat. Bank v. Matthews, 98 U. S. 621		23
United States v. Erie R. Co., 107 U. S. 1		91
United States v. Phila. etc. R. Co., 123 U. S. 113		91
Waite v. Dowley, 94 U. S. 527		64

Name of Case	Report	Pages in Brief
Waters-Pierce Oil Co. v. Texas,	212 U. S. 86	26
Western Nat. Bank v. Armstrong,	152 U. S. 346	13
Western Union Tel. Co. v. Att'y Gen'l of Mass.,	125 U. S. 530	42
Winona etc. Land Co. v. Minnesota,	159 U. S. 526	94

Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 266.

THE CLEMENT NATIONAL BANK,
Plaintiff in Error.

v.

THE STATE OF VERMONT,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

BRIEF OF THE DEFENDANT IN ERROR.

Statement.

To facilitate discussion, the plaintiff in error will herein be referred to as "the bank," the defendant in error as "the State," state savings institutions as "savings banks," and deposits in National banks within the class covered by the statute under discussion as "National bank deposits."

In this action, the State of Vermont sues in assumpsit to recover on a stipulation filed by the bank with the Commissioner of State Taxes, wherein the bank agreed with the State that on or before April 30th, 1909, it would make sworn returns to the State Treasurer and the Commissioner of State Taxes, showing the average amount of all deposits held by it during the six months beginning October 1st, 1908, whereon the rate of interest paid or allowed by it to the depositors thereof exceeded two per cent. per annum, and that it would, on or before April 30, 1909, pay to the State Treasurer a tax of 7/20 of one per cent. of the average amount of all such deposits.

Pleas of the general issue and *ultra vires* are treated as having been filed, and all formal pleas by both parties are waived. (Record, p. 18, Art. XVII.) But the execution of the stipulation sued on is not denied. The case was heard on an agreed statement of facts appearing on pp. 14-19 of the Record.

The consideration set forth in the stipulation is, in substance, the release of all of the bank's depositors of the class in question from the duty of making individual returns of their deposits to the local and state authorities, and of the duty of paying the tax thereon, and also the issuance to the bank of a certificate by the Commissioner of State Taxes evidencing the fact that the bank had elected to pay according to the stipulation.

Statement of Facts Controverted.

The following items in the "Statement" in the bank's brief are either controverted, or regarded by the State as immaterial:

1. The characterization throughout of the amount stipulated to be paid by the bank as a "tax."

2. The statement or assumption on p. 8 of the bank's brief to the effect that the introduction of a bill in the General Assembly of 1912 (which did not pass) amending the act of 1906, "Relating to the Taxation of Deposits in Savings Institutions and National Banks," affords any indication that the General Assembly "looks upon deposits in National banks as a source of revenue on a par with deposits in savings banks and to be taxed in substantially the same way, namely, on their business or franchise."

3. The statement on p. 10 of the bank's brief as to the number of non-resident depositors, while not controverted, has no place in the case here—as the bank itself concedes in the last paragraph on p. 14 of its brief.

4. The statement on p. 14 of the bank's brief —"If the present law stands, there will soon be an increase in the rate of the tax"—is wholly unwarranted by any fact appearing of record, even if it would be of any materiality whatever if true. The bank's brief states, at p. 8, that the proposition to increase the tax rate *"failed of passage."*

5. The statement on pp. 11, 12, of the bank's brief, as to what the bank has been compelled to do, is controverted, as is everything in the "statement" alleging compulsion in any form.

6. The argumentative portion of the bank's "statement" is objected to, as are all inferences of fact or of law drawn from facts stated or assumed.

Nature of Action; Bank's Position.

The nature of the action and the bank's situation therein are well stated by the Supreme Court of Vermont thus—record p. 32, fol. 61:

> "The suit is upon the bank's agreement to pay the taxes of its depositors, and not for the collection of a tax as such. The claim is not contested by the persons whose property is chargeable with the amount to be paid, but by the bank which has assumed the payment under statutory authorization. Those upon whom the tax was imposed have been omitted from the tax list *because of this undertaking of their depositary*. The substitution of the bank for the depositor as the one responsible for the payment of the tax, was effected by its own act."

The foregoing extract from the opinion below, so far as it relates to matters of fact, will be treated as binding in this court.

Rankin v. Emigh, 218 U. S. 27.
Kerfoot v. Farmers & M. Bank, 218 U. S. 281.

Points Urged by Bank.

The bank's brief groups its points under these heads:

1. INTERFERENCE WITH NATIONAL BANKS AS FEDERAL INSTRUMENTALITIES. (PP. 17-40.)

2. ULTRA VIRES. (PP. 40-52.)

3. NO CONSIDERATION FOR STIPULATION. (PP 53-89.)

A.

As preliminary to a discussion of the above propositions, we desire to discuss the point that

The Construction Given by a State Court to the Laws of That State is Final.

It is fundamental that the construction given to a state constitution or a statute by the highest court of that State is binding upon the courts of the United States; and it is believed that the authorities justify the contention that this Court will regard the decision below not only as having settled all questions relating to the alleged conflict between this statute and the state constitution, but will likewise follow the state court's construction of the statute in judging whether it conforms to the Federal constitution and laws. It is not contended that a decision of a state court that a statute, as construed by it, is not in conflict with the Federal constitution is controlling here—for such a decision is certainly reviewable.

> *Illinois Cent. R. Co. v. Illinois,* 163 U. S. 142, 153.

But *on the bare question of construction,* it is maintained that this court will adhere to the decision below. Thus, in *Missouri Pac. R. Co. v. Nebraska,* 164 U. S. 403, this court reviewed a decision of the Supreme Court of Nebraska ordering a railway company to comply with an order of the board of transportation as to granting the right to erect an elevator upon the railway's right of way, on terms and conditions similar to those previously granted to other parties. The state court had held that the statute authorized such order. In holding that the statute purported to allow the taking of property without due process, this court said

that the construction given the statute by the state court must be accepted, on the question as to what it authorized. In other words, the *construction of the statute* presents no Federal question.

> *Martin v. West,* 222 U. S. 191, 196.
> *Illinois Cent. R. Co. v. Illinois,* 163 U. S. 142, 152.
> *Chicago, etc., R. Co. v. Minnesota,* 134 U. S. 418, 456.

Thus far, the cases cited on this proposition afford instances where the state court's construction has operated to bring statutes into conflict with the Federal constitution; but the rule is none the less applicable when such construction will avoid all conflict.

Thus, in *Howe Machine Co. v. Gage,* 100 U. S. 676, a Tennessee statute was considered which imposed a tax on peddlers of sewing machines. The Supreme Court of the State had held that "the law taxing the peddlers of such machines levied the tax upon all peddlers of sewing machines, without regard to the place of growth or produce of material or manufacture." This court, speaking by Mr. Justice Swayne, said:

> "We are bound to regard this construction as correct, and to give it the same effect as if it were a part of the statute. (*Leffingwell v. Warren,* 2 Black, 599" (67 U. S. 261);

and the court, on the construction so adopted, held that the act was not invalid as interfering with interstate commerce.

Nor will the court hesitate to apply this rule, within

the limits indicated, even if its own opinion be otherwise.

Thus, in *Bucher v. Cheshire R. Co.*, 125 U. S. 555, the statute in question provided that a person traveling "on the Lord's Day, except for necessity or charity," should be fined. The plaintiff was injured through defendant's negligence while traveling on the latter's road on Sunday, in violation of the statute. After the injury, the Massachusetts legislature passed an act declaring that this prohibition against traveling on the Lord's Day should not constitute a defence to an action against a common carrier for injuries received while so traveling. Prior to this last named statute, the Supreme Court of Massachusetts had decided that a plaintiff who had been injured while violating the first named act could not recover—though the statute itself did not say so. The Supreme Court of the United States evidently did not think this decision a correct one; but, speaking through Mr. Justice Miller, it said at p. 584:

> "We are of opinion that the adjudications of the Supreme Court of Massachusetts, holding that a person engaged in travel on the Sabbath Day, contrary to the statute of the State, being thus in the act of violating the criminal law of the State, shall not recover against a corporation upon whose road he travels, for the negligence of its servants, thereby establish this principle as a local law of that State, declaring, as they do, the effect of its statute in its operation upon the obligation of the carrier of passengers. The decisions on this subject by the Massachusetts court are numerous enough and of sufficiently long standing to establish the rule, so

far as they can establish it; and we think that, taken in connection with the relation which they bear to the statute itself, though giving an effect to it which may not meet the approval of this court, they nevertheless determine the law of Massachusetts on that subject."

This case was followed in

Grand Trunk R. Co. v. Ives, 144 U. S. 408, 423.
Schurz v. Cook, 148 U. S. 397, 411.
Merchants' Bank v. Penna., 167 U. S. 462.

The rule likewise applies in determining what part of a statute, if any, is separable from its other provisions.

Thus, in *Tullis v. Lake Erie, etc. R. Co.*, 175 U. S. 348, the question was as to the constitutionality of the Indiana statute relating to railroads and other corporations, except municipal corporations, and the state court had decided that it was valid as to railroad corporations, even though it might not be as to the other corporations reached by the act. This court held that this was equivalent to ruling that the act was capable of severance, and that such ruling would be followed here; and that "the elementary rule is that this court accepts the interpretation of a statute of a State affixed to it by the court of last resort thereof."

The last cited case emphasizes the point that the state court's construction of the laws of that State, whereby they are rendered consistent with the Federal constitution, are controlling, when to hold otherwise would be to make them repugnant thereto.

And it is in respect of laws relating to taxation that the decisions of a state court are especially controlling

—save, of course, as to purely Federal questions; and while this is not a suit to recover taxes, as the state court has expressly held, yet, as bearing on the consideration for the contract sued on, it is said that the question of the state's primary right to tax National bank deposits and the methods provided by the act for doing it, are involved. The following language of Mr. Justice Brewer, speaking for the court in *Lewis v. Monson*, 151 U. S. 545, seems much in point:

> "No question is more clearly a matter of local law than one arising under the tax laws. . . . The determination of any questions affecting them is a matter primarily belonging to the courts of the State, and the national tribunals universally follow their rulings except in cases where it is claimed that some right protected by the Federal constitution has been invaded."

How, then, has the Supreme Court of Vermont construed this statute? Attention is called to the following extracts from the opinion, the page references being to the record:

1. Nature of Tax.

> "The defendant argues that by the terms of the statute the tax is upon the deposits, and that inasmuch as the deposits are the property of the bank, and properly used in its business, the tax is upon the property or business of the bank. But the language of the statute does not require this construction. The transaction which makes the money the property of the bank gives the depositor a credit of equal amount, and the term 'deposit' may be used to indicate the money deposited or the credit which the

depositor receives for it. The last must be taken to be the meaning here, for the statute lays the tax upon the depositor in so many words." (pp. 33, 34, fol. 64.)

2. Valuation.

"But the defendant says that sections 804 to 808 in fact provide for a further assessment, and that the things required have not been done and that consequently no assessment has been made. But the only thing that we are concerned with at this stage of our inquiry is whether the statute is a sufficient provision for the making of a lawful assessment. A fair test of the matter would seem to be this: If a resident depositor has made the required returns to the commissioner and the listers, and the listers have made their return to the commissioner, could the depositor have avoided payment of the tax on the ground that no official judgment has been passed on the value of his deposit? It is obvious that the only question affecting valuation would be one as to the solvency of the bank. In the taxation of cash there is no distinction between actual value and face value. A credit of a certain amount payable on demand in cash values itself, if the payer is solvent. Under a general law the value of all income-bearing securities for taxing purposes is determined by their amount. A taxpayer cannot reduce his list by valuing his invested funds according to the rate of interest they bear. This statute relates solely to interest-bearing deposits, and interest-bearing deposits are presumably good. Certainly a National bank open for business and paying interest regularly on its deposits may be presumed to be a solvent debtor. A taxpayer holding a note on which interest is regularly paid cannot properly return it as due

from an insolvent debtor on the ground that the debtor's financial condition is such as to place him beyond the reach of disaster. No more can a depositor in a bank object to an assessment of his credit at its full amount because of the possibility that the bank may prove insolvent. In view of these considerations we think that the assessment provided by the statute is not invalid because of the failure to provide for an official valuation." (pp. 35, 36, fol. 68, 69.)

From the foregoing extracts indicating how the state court has construed the act, and in view of the authorities cited, we maintain that the following propositions are to be taken as having been settled below:

1. That the statute assesses no tax upon the property or business of a National bank.

2. That all legal requirements for assessing the depositors are met.

While these points will be discussed in another connection, on their merits, we think that the state court's rulings thereon should be here followed, for they really go to the construction of the act.

B.

Discussion of Bank's Points.

The bank's second point—that of *ultra vires*—will be first discussed by us; because if the bank had no business to make the agreement, the case ends there, probably.

The first and third points—(1) Interference with a Federal Agency, and (3) No Consideration for the Contract—we discuss together, under the general head

of *"Legal Obligation of the Stipulation,"* as one point necessarily overlaps the other in some respects, and both go to the question whether the state has an enforceable right of action.

1. Bank's Second Point.
(*Ultra Vires*)

In the stipulation sued on, the bank agrees to do the following things:

> (a) To make sworn returns to the State Treasurer and the Commissioner of State Taxes, showing the average amount of all deposits held by it during the six months beginning with October 1, 1908, whereon the rate of interest paid or allowed by the bank to the depositors thereof exceeds two per cent. per annum.
>
> (b) To pay to the State Treasurer, on or before April 30, 1909, a tax of seven-twentieths of one per cent. of the average amount of all such deposits held by it.

The use of the word "tax" in this stipulation has no special significance; for the Supreme Court of Vermont in construing the act says (Record, p. 42, fol. 83), that "the use of the term 'a tax' cannot be given an effect adverse to the state's claim, for the agreement proceeds to say that it is made for the purpose of carrying out the statutory provisions which relieve the depositors from making the returns and paying the tax."

In this question of *ultra vires* is somewhat involved that of the consideration for the stipulation. We discuss that question in that part of this brief relating to the legal obligation of the stipulation, pp. 25.

HAD THE BANK THE RIGHT TO ENTER INTO THE STIPULATION?

This inquiry involves an examination into the rights of a National bank under the broad provision of the third subdivision of U. S. Rev. Sts. 5136, which gives to it the power to "make contracts," taken in connection with that part of the seventh subdivision of the same section which authorizes it to exercise "all such incidental powers as shall be necessary to carry on the business of banking;" . . . . "by receiving deposits," etc.

As to the scope of the term "incidental powers," see

> *Western Nat. Bank v. Armstrong*, 152 U. S. 346,
> *First Nat. Bank of Charlotte v. Nat. Exh. Bank*, 92 U. S. 127.

Now as a National bank has the right to receive deposits, and the right to make contracts, is not a contract that legitimately tends to increase its business in the line of receiving deposits strictly *intra vires?* Cannot it make a contract whereby its depositors will be relieved from the performance of certain duties, from local publicity as to their deposits, and from the payment of the tax assessed thereon?

It has been held that it is the business of a National bank to lend and not to borrow—*Western Nat. Bank v. Armstrong*, 152 U. S. 346—likewise that a deposit of the character in question creates the relation of debtor and creditor—*State v. Peoples' Nat. Bank*, 75 N. H. 27; but so far as we are aware, it has never been maintained that a National bank could not pay interest to its depositors. Yet the National Bank Act may be searched in vain for any express authority in this regard.

There seems to be no particular occasion to inquire whether National banks are within their powers in maintaining these so-called savings departments; and under the broad authority to "receive deposits" conferred by the National Bank Act, there appears to be no reason why a National bank may not have such a department for receiving deposits under rules similar to those adopted by savings banks respecting the time and manner of withdrawal, the payment of interest, etc., though unquestionably such deposits must be employed in the modes prescribed by the National Bank Act. It is a well-known fact that National banks are doing this sort of business, and soliciting it, without interference, so far as we are aware, on the part of the Federal government. This indicates that such business is not only lawful, but is profitable to the banks. And in counsel's "Notes for Argument," p. 1, it is stated that the bank "in the course of its business has established a department for the deposit of savings."

Now if, by agreement with the taxing power, a National bank can relieve its depositors from the trouble, care, publicity and expense incident to the details of making returns and paying taxes, is not that of advantage to its depositors? And, if of advantage to them, is not the bank itself ultimately benefited?

That the plaintiff in error regarded itself as being benefited by the provisions of this act, and that it took advantage of it as a means of attracting custom, most clearly appears from article XVI of the agreed facts, Record p. 18, where the following phrases representative of the character of its newspaper advertisements are quoted:

(a) "We pay you interest at 3½ per cent. and also pay the taxes."

(b) "No reports to make, or taxes to pay."

(c) "We pay taxes on deposits of any amount."

(d) "We pay 4 per cent. on savings accounts in any amount from one dollar upwards. *All taxes are paid by the bank,* and you do not need to report deposits in this bank to the listers."

(e) "We pay 4 per cent. interest on accounts large and small,—no limit."

(f) "Taxes on savings deposits in this bank are paid by us, and you do not need to report your deposits to the listers. We do not limit our depositors to $2,000, but pay taxes on any amount from one dollar upwards."

(g) "Be sure and take advantage of the law governing taxes on deposits in National banks. Our depositors do not make any report of their deposits to the listers."

(h) "Under the law governing savings deposits in National banks, we pay all taxes on any amount. There is no $2,000 limit. *You can carry any amount tax free,* and no report of your deposit is made by the bank to the listers."

(i) "We pay the taxes on deposits of any amount from one dollar upwards. *The taxes are paid on average deposits,* and the names of the depositors are not given by the bank."

Assuming perfect equality of advantage in other respects, it is clear that an investment which promises the minimum of personal care and attention by the investor, and the least degree of local publicity, is the more desirable. Suppose there were no provision in the statutes of Vermont whereby a National bank could relieve its depositors from making returns to the local

and state authorities, and from paying taxes, could not such banks and their depositors urge with some reason that they were at a disadvantage, as compared with savings banks and their depositors?

Prior to and at the time of the passage of this act, the savings banks of Vermont paid to the state an annual tax of seven-tenths of one per cent. on their average deposits, both interest-bearing and commercial, and no other taxes were assessed on such deposits, except on individual deposits in excess of two thousand dollars in any one such institution.

> Pub. Sts. of Vt., Secs. 744-746; (quoted in full on pp. 85.)

Thus, depositors in savings banks, within the limits indicated, were entirely relieved from their duties and liabilities as taxpayers. So when National banks in the State of Vermont entered into the "savings department" field, as competitors with savings banks for the same class of business, this was the situation:

The savings bank depositor was tax-exempt, up to two thousand dollars in any one institution; and by distributing his deposits among the forty-nine different state institutions (agreed facts, Art. XV, record p. 18), he could invest therein ninety-eight thousand dollars, tax-free and without local publicity.

But the National bank depositor must list such property for local taxation. (Vermont Statutes [1894], secs. 356, 374, 399, in force when this act was passed.) It was subject to the tax rate of the particular town in which he lived; and in 1908, these tax rates varied from $7.50 to $39.80 per $1,000—the average being $16.70.

(Agreed facts, Art. XIII, record p. 17.) The taxpayer's inventory must be sworn to, and the pains and penalties of perjury attached in case of false oath. (Pub. Sts. of Vt., sec. 583.) If he failed to return an inventory, or if the listers thought it incomplete or incorrect, he was subject to doubling, or to extra assessment. (Pub. Sts. of Vt., sec. 561.) His inventory was subject to examination by town and prosecuting officers, and to production in court on subpoena. (Pub. Sts. of Vt., sec. 581.) (All statutes cited appear in Appendix hereto, p. 97.)

In these circumstances, the State of Vermont, by No. 41 of the Acts of 1906 (Pub. Sts. of Vt., secs. 804-820), which is the act under consideration, assessed a state tax at the semi-annual rate of seven-twentieths of one per cent, against National bank depositors of the class in question, required them to make returns of their deposits both to the local and state authorities, and exempted them from all other taxation. The tax itself, as the Supreme Court of Vermont has expressly held, was laid "upon the depositors in so many words." (Record, p. 34, fol. 64.)

Now had the act stopped here, a measurable degree of relief would have been afforded to National bank depositors. The property represented by their deposits would have been withdrawn from the realm of local taxation, with its absurd variations in rate, and subjected to a low uniform rate of less than half the average local rate. But the taxpayer would still be bound to make local as well as state returns, and personally to pay the tax, in which respects the savings bank depositor would have an advantage.

But the law went farther. It provided a way whereby the National bank itself, if it so elected, might stipulate with the State that in lieu of the tax assessed against the depositor of the bank it would pay to the State a sum to be arrived at by the simple process of a semi-annual computation on its average deposits (of resident depositors) at the rate of seven-twentieths of one per cent.; and in consideration of this agreement, the State agreed that it would release all its rights as against the depositors,—thus putting them approximately in the same situation as depositors in savings banks.

Prior to the stipulation sued on, the bank had filed like stipulations, so that the stipulation in suit was not executed in ignorance of its effects. Had not the bank signed the stipulation in suit, the State's rights as against the individual depositors would have been preserved. As stated in the opinion below, the substitution of the bank as the responsible party was effected by its own act. (Record, p. 32, fol. 61.)

It requires no extended argument to demonstrate that this arrangement was of advantage to the bank, as a business proposition. And the statement in the opinion below—Record, p. 39, fol. 77—that "the case affords indications that the National banks are benefited by the act," is abundantly justified by the facts in the case of this particular bank; for during the period covered by the stipulation in suit its savings deposits increased from $573,744.97 to $606,928.44. (Agreed facts, Art. VI., Record pp. 15, 16.) And in discussing the so-called element of duress, the bank maneuvers itself into the position of maintaining that the tendency of the stipula-

tion is to enable it to keep its business; for it argues that if it had refused to sign the stipulation, its depositors would have withdrawn their money and put it into savings banks. (Bank's brief, pp. 34, 35.)

And yet the bank, after having benefited from the provisions of the act by means of this stipulation and prior ones, and having publicly advertised the attractive character of the proposition it was able to make to its customers in consequence of the act, and having caused the State to relinquish its rights as against its depositors for direct payment, now seriously urges that it had no right to make the agreement and that the State is powerless to enforce it.

This leads to a consideration of the question whether the bank could lawfully make the agreement.

The powers of National banks are set forth in U. S. Rev. Sts. sec. 5136; and while that statute specifies the main things a National bank may do, it does not assume to specify all, nor does it prohibit all not specified. To illustrate: A large part of the banking business consists in making collections, and its powers in this behalf are not questioned; but the right is not expressly conferred by the National Bank Act.

Speaking broadly, it may be said that National banks may make any contracts which legitimately appertain to the business of banking, as defined by statute, provided the powers exercised are either expressly enumerated in the statute, or are properly incidental to the enumerated powers.

Pattison v. Syracuse Nat. Bank, 80 N. Y. 82.
Logan Co. Nat. Bank v. Townsend, 139 U. S. 67, 73.

Thus, the authority given National banks to receive deposits also includes power to contract as to the parties to whom deposits shall be paid.

Sykes v. Canton First Nat. Bank, 2 S. D. 242, 259.

A National bank may be a depositary for the public money of a city, and may agree to pay interest on such deposits, and give bond for their security.

Interstate Nat. Bank v. Ferguson, 48 Kan. 732, 739.

National banks may not only receive general deposits but may likewise receive special ones, either for a compensation or gratuitously.

Nat. Bank v. Graham, 100 U. S. 699.
Pattison v. Syracuse Nat. Bank, supra.
First Nat. Bank v. Strang, 138 Ill. 347, 356.

In short, the powers of a National bank "are such as are required to meet the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others."

First Nat. Bank v. Nat. Exch. Bank, 92 U. S. 122, 127.

Nor is a National bank absolutely precluded from assuming another's obligations. Thus, in *Schofield v. State Nat. Bank* (C. C. A.), 97 Fed. Rep. 282, it was

held that a National bank has power to enter into a contract whereby, in consideration of the transfer to it of the office furniture, lease and cash assets of another National bank, it will assume and pay the liabilities of such other bank. See also

George v. Wallace (C. C. A.), 135 Fed. Rep. 286, 294.

An agreement by a National bank to pay another's taxes has likewise been upheld. In *Lull v. Anamosa Nat. Bank*, 110 Iowa 537, 542, it was held that an agreement by a National bank to pay taxes on its stock transferred to it and assessed at the time against the sellers, was valid, in consideration of the bank being allowed to retain unpaid dividends and surplus—though such taxes were unlawfully assessed. This was a suit between an individual and the bank; and the plaintiff, having paid the taxes which the bank had agreed to pay, recovered them back.

In another connection, we advance and discuss the theory that the State might in the first instance have compelled the bank to pay taxes for its depositors, as their agent. (See p. 61 hereof.) Without here repeating the suggestions made upon that point—if they are well founded this question is pertinent:

Is it *ultra vires* of the bank to agree to do something in lieu of something which the State might have obliged it to do?

In view of the opinion of this court in

Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24,

and kindred cases, it is of course idle to contend that if this stipulation is *ultra vires* in the strict sense, it can be enforced. That case, at p. 59, thus states the law:

> "A contract of a corporation which is *ultra vires* in the proper sense, that is to say outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature, is not voidable only, but wholly void and of no legal effect."

It is to be observed, however, that the contract in issue in that case involved an entire abdication of corporate functions, and was so strictly *ultra vires* that its enforcement would be destructive of the ends for which the corporation was created, and detrimental alike to the stockholders and to the public.

But it does not follow that every transaction by a National bank not strictly within its statutory powers is wholly void. Quoting from *Kerfoot v. Farmers & M. Bank,* 218 U. S. p. 286:

> "Thus, although the statute by clear implication, forbids a National bank from making a loan upon real estate, the security is not void, and it cannot be successfully assailed by the debtor or by subsequent mortgagees because the bank was without authority to take it; and the disregard of the provisions of the act of Congress upon that subject only lays the bank open to proceedings by the government for exercising powers not conferred by law."

The principal case cited by the court on the above proposition is

Union Nat. Bank v. Matthews, 98 U. S. 621,

in which Mr. Justice Swayne delivering judgment quotes approvingly from Sedgewick on Statutory and Constitutional Construction, viz.:

> "Where it is a simple question of authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains."

In the case at bar, the Commissioner of State Taxes in consideration of the bank's stipulation has issued to it a certificate, appearing as "exhibit B" on p 21 of the Record, which recites, among other things, the fact that the depositors in said bank are released from the duty of making returns of their deposits to said commissioner. Such certificate was conspicuously posted by the bank in its public banking rooms. (Agreed facts, Art. I., Record p. 14.) The bank has thus had the benefit resulting from the certificate and from its publicity. The State has, in consequence of the stipulation, foreclosed itself to assert its rights as against the individual depositors. Even if the bank's agreement be not strictly *intra vires,* it certainly seems unjust to allow it to interpose this defence, in these circumstances.

But be that as it may—it is earnestly contended that this stipulation is not *ultra vires;* that it pertains legitimately to the retention and successful development of

the bank's business in the line of receiving deposits of the character in question; that it is in no wise contrary to public policy; and that it does not in the remotest degree impair or affect the bank's functions as a Federal agency. The defendant had willingly executed such stipulations prior to the one in suit, and so far as the record shows had performed them without detriment to itself or to its depositors, and without any objection by a stockholder, by a depositor, or by the Federal government. It has urged upon the public the results of such stipulations as a reason why old depositors should let their money remain, and why those having money to invest should become depositors. Instead of its contracts with depositors as to interest being impaired, the advertisements show that the bank increased its interest rates after it commenced to file these stipulations; and instead of a decrease in business during this same period, the bank's figures show an increase. The State on the strength of the stipulation in suit formally relinquished its right to tax the depositors for the period covered thereby.

In these circumstances, we urge that law and morals, and justice and reason, require that the bank be held to its agreement.

II. Bank's First and Third Points.

We will discuss, as somewhat related propositions, the bank's first point,

> *Interference with Federal Agency* (bank's brief pp. 17-40), and its third point,
>
> *No Consideration for Stipulation* (pp. 53-89), under the general head of

Legal Obligation of the Stipulation.

We classify our discussion thus:

(A) CONSIDERATION.
(B) DURESS.
(C) INTERFERENCE WITH EXISTING CONTRACTS.
(D) RIGHT OF STATE TO COLLECT THROUGH BANK.
(E) CONSTITUTIONAL QUESTIONS.

(A) CONSIDERATION.

In connection with the question of consideration may be conveniently treated the alleged interference with a Federal agency, and the various constitutional questions raised by the bank; but before discussing these questions, we reiterate the point that the decision of the state court, so far as matters of fact and questions of general law are concerned, establishes in binding form the proposition that there was a legally adequate consideration for the stipulation.

1. CONSIDERATION, GENERALLY.

The Supreme Court of Vermont finds as a fact that "the case affords indications that the National banks are benefited by the act." (Record, p. 39, fol. 77.) Likewise the conclusion is reached "that the provision made for taxing the depositors is valid, and that the state's waiver of all proceedings under it afforded a sufficient consideration for the defendant's stipulation." (Record, p. 41, fol. 82.)

In so far as each of the foregoing holdings is "based upon a doctrine of general law sufficient of itself to

determine the case," it is submitted that the judgment is not subject to review, even though the bank formally seeks to avail itself of some right or immunity under the Federal constitution or laws.

Seeberger v. McCormick, 175 U. S. 274.
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86.

To illustrate: It appears from the opinion below that the waiver by the State of all proceedings against the depositor under the act afforded a sufficient consideration for the bank's stipulation. (Record, p. 41, fol. 82.) So far as such holding rests on general legal principles and is unconnected with any Federal question, it should be regarded as having settled the law in favor of the State.

But if any Vermont authorities are required to sustain the decision of its Supreme Court in this behalf, we refer to

Ballard v. Burton, 64 Vt. 387, 393,

to the effect that a waiver of a right, or a forbearance to exercise it, is a sufficient consideration for a promise made on account of it.

And this is so, even where the right forborne to be exercised is a doubtful one.

Bellows v. Sowles, 55 Vt. 391.
Blake v. Peck, 11 Vt. 483.

Nor is it material that the consideration is inadequate to the promise. The slightest consideration is enough to support the most onerous obligation.

Churchill v. Bradley, 58 Vt. 403.
Giddings v. Giddings, 51 Vt. 227, 236.
Dorwin v. Smith, 35 Vt. 69.

An inquiry into the question of consideration involves a discussion of the State's right to tax the deposits to the depositor; for if the fact that the deposits are in a National bank absolutely precludes the State from taxing the depositor's property represented thereby, then it will be conceded that the State had nothing to surrender in consideration for the stipulation. And on this phase of the discussion is involved somewhat the question whether any interference with the bank as a Federal agency is effected.

It should constantly be borne in mind that in this proceeding no depositor contests the validity of the tax which the State imposes on him, nor does any depositor complain that his rights are impaired by reason of the bank's stipulation, or because of this suit to enforce it; and on the bank's own contention, it is difficult to see how any depositor could intervene—it being strenuously urged by the bank that its stipulation is not to pay the taxes for which the depositors are primarily liable, but another and a different thing. (Bank's brief, p. 12.)

As before stated, this action is in no sense one to recover a tax. It is assumpsit, brought on the bank's voluntary agreement to pay the State something to relieve its depositors from the duty of making returns and paying their taxes. It is true that the statute and the stipulation refer to the sum claimed to be due from the bank as a "tax;" and, in the sense that this sum, if paid or recovered, goes into the state treasury to be used in the same manner as ordinary state revenue, this char-

acterization is well enough. But as it results from a voluntary agreement to pay something, but for which agreement the State would have no right of action against the bank, it is not a tax,—it is not an enforced contribution in the sense that a tax is.

Even in laws imposing taxes, where it is evident that a term is incorrectly employed, the court will not attach a technical meaning to it so as to defeat the legislative intent.

An illustrative case is that of

Adams Express Co. v. Kentucky, 166 U. S. 171,

where a taxing statute was involved which made repeated use of the term "franchise;" and the court says, at p. 180:

> "Taking the whole act together . . . . . it is evident that the word 'franchise' was not employed in a technical sense, and that the legislative intention is plain that the entire property, tangible and intangible, of all foreign and domestic corporations, and all foreign and domestic companies possessing no franchise, should be valued as an entirety," etc.

And so here—while the statute and the stipulation each refer to the amount to be paid by the bank as being a "tax," in view of the whole act it is evident that such term was not employed in the strict sense, and, as the state court said, it is not to be given an effect adverse to the state's claim. This we think answers points (a), (b) and (c), pp. 17-19 of bank's brief.

The bank's obligation is predicated on its contract

with the State, and a discussion of the state's right to tax the sum represented by the deposits to the depositors, and of the legality of the mode prescribed for doing it, is material only so far as it affects the consideration for the contract.

The consideration set forth is, in substance, the release of all the bank's depositors of the class in question from the duty of making returns of their deposits, and of paying taxes thereon, and also the issuance of a certificate by the Commissioner of State Taxes evidencing the fact that the bank had elected to pay according to the stipulation. The legal effect of the execution and filing of the stipulation, and of the issuance of the certificate, is to release the depositors from their obligations to the State, to deprive the State of its right to collect taxes from the depositors, and to create a contractual obligation against the bank in favor of the State.

This leads to a discussion of the right of the State to tax the depositors.

2. RIGHT OF THE STATE TO TAX.

It is fundamental that the taxing power of the State extends to all persons and property within its jurisdiction, in the absence of constitutional inhibition, or some Federal law prohibiting it.

Kirtland v. Hotchkiss, 100 U. S. 491.

In the case last cited, Mr. Justice Harlan says, pp. 498, 499:

> "It may therefore be regarded as the established doctrine of this court that so long as the State, by

> its system of taxation, does not intrench upon the legitimate authority of the Union, or violate any right recognized or secured to the citizen by the constitution of the United States, this court, as between the citizen and his State, can afford no relief against state taxation, however unjust, oppressive, or onerous . . . . Whether the State . . . . shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes, in return for the protection it affords them, by the value of the credits, choses in action, bonds, or stocks which they may own (other than such as are exempted or protected from taxation under the constitution or laws of the United States) is a matter which concerns only the people of that State."

It is equally clear that neither the State nor its municipalities can impose taxes on National banks beyond what the National Bank Act authorizes, as they are instrumentalities of the Federal government, and, as such, under its paramount authority.

> *Davis v. Elmira Sav. Bank,* 161 U. S. 275, 283.
> *Mercantile, etc., Bank v. Mayor, etc.,* 121 U. S 138.

These provisions are without question exclusive, and any other state tax, whether imposed on property or franchise, is unlawful.

> *Owensboro Nat. Bank v. Owensboro,* 173 U. S. 664.
> *Rosenblatt v. Johnson,* 104 U. S. 462.

Thus, the following kinds of taxes, applied to National banks, have been held void:

A "business tax" by a municipality.

Pittsburg v. First Nat. Bank, 55 Pa. 45.
Macon v. First Nat. Bank, 59 Ga. 648.

A "license tax" by a municipality.

Carthage v. First Nat. Bank, 71 Mo. 509.
Second Nat. Bank v. Caldwell, 13 Fed. R. 429.

A tax on "franchise and property."

Third Nat. Bank v. Stone, 174 U. S. 432.
Owensboro Nat. Bank v. Owensboro, supra.

In *McClellan v. Chipman,* 164 U. S. 347, it is held that the two following propositions are harmonious:

First: "National banks are subject to the laws of the State, and are governed in the course of their business far more by the laws of the State than of the nation. All their contracts are governed and construed by state laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts are all based on state law. It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional." (*Nat. Bank v. Commonwealth,* 9 Wall. 362.)

Second: "National banks are instrumentalities of the Federal government created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by the State to define their duties, or control the conduct of their affairs, is absolutely

> void, whenever such attempted exercise of authority conflicts with the laws of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiency of those agencies of the Federal government to discharge the duties for the performance of which they were created." (*Davis v. Elmira Sav. Bank,* 161 U. S. 275, 283.)
>
> In the *McClellan case,* the court says (164 U. S. p. 357), that "these propositions practically contain a rule and an exception, the rule being the operation of general state laws upon the dealings and contracts of National banks, and the exception being the cessation of the operation of such laws whenever they expressly conflict with the laws of the United States, or frustrate the purpose for which National banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States."

As has been shown, money deposited in savings departments of National banks becomes the property of the bank. What is it, then, upon which the tax is assessed upon the depositor? It is not assessed upon the money itself, but upon the credit arising in the depositor's favor—his chose in action—and the Supreme Court of Vermont has so construed this statute.

Record, pp. 33, 34, fol. 64, 65.

The taxable status of such property in Vermont is fixed by section 488, Pub. Sts. of Vt., viz.:

> "The words 'taxable property,' as used in this title, shall include taxable estate, both real and personal, including choses in action."

And on p. 18 of the bank's brief, it is conceded that

the deposits are assessable to the depositor as a debt due him from the bank.

Nor is the tax in any sense one on the bank's capital. Quoting from the opinion below—Record, p. 34, fol. 64:

> "The deposits of a bank increase its capacity for doing business, but they are not capital stock in any view. *Society for Savings v. Coite,* 6 Wall. 594. The capital stock of National banks is taxed to the individual holders by permission of Congress, and could not be taxed without such permission. *State of New York v. Weaver,* 100 U. S. 539. But it does not follow that congressional authority is needed to enable the State to tax National bank deposits to the depositors. The 'capital stock' of a bank is the sum on which it is authorized to do business and the permanent basis of its credit. A 'general deposit' is a loan to the bank, and the right of the depositor a mere chose in action. (Citing cases.) It is true that the deposits become a part of the working capital of the bank, and that any taxation of the depositors may have a tendency to lessen this resource; but it can hardly be supposed that the efficiency of National banks as instrumentalities of the Federal government will be endangered by any taxation of depositors which is free from unjust discrimination. If the defendant's contention is correct, all uninvested capital in the State can escape taxation by seeking a refuge in National banks."

The foregoing is not quoted as being decisive here as to the matters therein referred to, but as a concise statement of the State's position that the depositor's credit is the thing taxed, and that in taxing it to him the State is

in no wise taxing the bank's property, nor obstructing its functions as a Federal agency.

3. NO INTERFERENCE WITH A FEDERAL AGENCY IS INVOLVED.

Under a discussion of the consideration for this agreement, going as it does to its enforceability, may conveniently be treated the question whether said agreement in anywise impairs the functions of the bank—a point urged by the bank in its brief, pp. 17-40. It is to be observed that the bank fails to specify what particular function is impaired—unless it is done in the sweeping claim that the act subjects the bank to "the supervision of another sovereignty." The whole tendency of the bank's argument of this point is to claim for it an absolute immunity from the operation of state laws.

What are the duties and functions of a National bank as between itself and the Federal government?

The language of Mr. Justice Matthews, speaking for the court in *Mercantile Nat. Bank v. Mayor, etc.*, 121 U. S. 138, 154, affords an answer to this question, and clearly sets forth the reasons for the limitations on the taxing power of the State:

> "The object of the law was to establish a system of national banking institutions, in order to provide a uniform and secure currency for the people, and to facilitate the operations of the Treasury of the United States. The capital of each of these banks in this system was to be furnished entirely by private individuals; but, for the protection of the government and the people, it was required that this capital, so far as it was the security for its

circulating notes, should be invested in the bonds of the United States. These bonds were not the subject of taxation; and neither the banks themselves, nor their capital however invested, nor the shares of stock held therein by individuals, could be taxed by the States in which they were located without the consent of Congress, being exempted from the power of the States in this respect, because these banks were means and agencies established by Congress in execution of the powers of the government of the United States. It was deemed consistent, however, with these national uses, and otherwise expedient, to grant to the States the authority to tax them within the limits of a rule prescribed by the law. In fixing these limits it became necessary to prohibit the States from imposing such a burden as would prevent the capital of individuals from freely seeking investment in institutions which it was the express object of the law to establish and promote."

Congress has conferred on National banks the power to receive deposits (Rev. Sts. U. S. 5136, par. 7); and that power is not in anywise affected by the Vermont act, in a legal sense.

The Vermont act in no wise restricts or regulates the receiving of deposits, nor does it undertake to control their management or investment. It does not fix any limits beyond which the deposits shall cease to be subject to the low state tax, and become subject to the higher local rate—as was done in the case of deposits in savings banks.

SEC. 510. Taxable personal estate shall be set in the list to the last owner thereof on the first day of April in each year, in the town, village, school

and fire district where he resides, with the following exceptions:

. . . . . .

VIII. Deposits in all savings banks, savings institutions and trust companies without this state; in all banks, national banks and banking houses within or without this state, other than in National banks within this state whereon interest exceeding the rate of two per cent. per annum is paid or allowed by such National banks, and in savings banks, savings institutions and trust companies; *and the excess over two thousand dollars in any one savings bank, savings institution or trust company within this state, on the first day of April in any year, shall be set in the list to the owner thereof in the town, village, school and fire district wherein he resides.*

See also Pub. Sts. of Vt., sec. 744, 745, quoted at p. 85 hereof.

If state laws are absolutely powerless to reach this class of property for taxation, why should it not likewise be exempt from trustee process, or from the laws relating to the descent and distribution of personal estate? So far as the taxing features of this law are concerned, is there any more interference with a Federal agency in the one case than in the other?

On p. 21 of its brief, the bank seems to contend that as sections 804 and 805 of the law require the depositors to report the names of National banks wherein they have deposits, and the amount thereof, to the Commissioner of State Taxes and to the listers, an intent is disclosed to tax the bank itself. Such contention is untenable; for there is no relation between the depos-

itor's returns, and the bank's stipulation and the returns thereunder. If there is a stipulation, there are no returns from depositors. The amount to be paid by the bank is not based on the depositor's returns—for in that case there are none. The requirement of returns from depositors is not aimed at the bank, but at the depositors; and, as matter of specification, the State has the right to demand details from the depositors. Should the Commissioner of State Taxes have occasion to sue a depositor for taxes, under section 811 of the law, the return made by the depositor would enable him to allege the location of the deposit, and also to reach it by trustee process, as provided in section 812.

While it is absolutely immaterial here as to what is required of the depositors—they not contesting in any way—we dispute the statement on p. 64 of the bank's brief that "no such publicity is required of other taxpayers regarding their personal property." A detailed specification is required, under the general tax law. The general inventory blanks must be so formulated as to contain, when filled, "a full statement of all taxable property, real and personal, of each taxpayer." (Pub. Sts. of Vt., sec. 536.) In case of deductions claimed for debts owing, the name and residence of each creditor must be given (id. sec. 537); and this latter requirement is not confined to a specification of resident creditors who would be taxable on account of the debts due them. The taxpayer's oath must set forth that his inventory contains a "full, true and correct *list and description*" of all his taxable property. (id. sec. 540.) The sections above cited are as follows:

SEC. 536. *Blanks.* The secretary of state shall

annually, on or before the first day of March, furnish at the expense of the state, to the several town clerks, blank inventories sufficient in number to meet the requirements of this chapter, and in the most convenient form, with suitable interrogatories, to contain, when filled, a full statement of all taxable property, real and personal, of each taxpayer in such town. . . . .

SEC. 537. *Contents.* Such blanks shall, besides other interrogatories required by the preceding section, contain interrogatories for a statement of the amount of cash on hand and debts due or to become due from solvent debtors; for a statement of the aggregate amount of deposits in savings banks, savings institutions and trust companies without this state; for a statement of the aggregate amount of deposits in all banks, national banks and banking houses, both within and without this state other than in national banks within this state whereon interest exceeding the rate of two per cent. per annum is by such bank paid or allowed, and in savings banks, savings institutions and trust companies in this state; for a statement of the aggregate amount of checks and drafts on savings banks, savings institutions, savings banks and trust companies, trust companies, banks, banking houses and national banks; for a statement of the value of debts due or to become due from insolvent debtors; for a statement of the amount of his deposits in excess of two thousand dollars in any one savings bank, savings institution or trust company in this state; for a statement by each taxpayer claiming a deduction for debts owing, of the aggregate amount of his deposits in all national banks in this state whereon interest exceeding the rate of two per cent. per annum is paid or allowed by such banks, and in all savings banks, savings institutions and trust

companies in this state; for a statement of debts owing by him on account of which he claims a deduction, with the name and residence of each person to whom such debt is owing, with the amount thereof; for a statement by each taxpayer who may claim a deduction on account of debts owing, of the amount of United States government bonds owned by him; and for a statement by each taxpayer of the amount of other stocks and bonds and town, city, village and incorporated school district loans, exempt from taxation by the laws of this state, owned by him.

SEC. 540. *Taxpayer's oath.* Such inventories shall also contain the following oath: "I, ———— of ————, do solemnly swear (or affirm) that the above is a full, true and correct list and description of all my taxable property, both real and personal, and all property which should be set in the list to me, and that I have set down only such debts as I am unconditionally bound to pay, to the amount of the deduction claimed; that my answers to these interrogatories are correct, according to my best knowledge, and that I have not conveyed or disposed of any property or estate in any manner, or created any debt for the purpose of evading the provisions of law or affecting the value and amount of my taxable estate, so help me God (or under the pains and penalties of perjury)."

On page 51 of the bank's brief, the case of *Dolley v. Abilene National Bank* (C. C. A.), 179 Fed. R. 461, is strongly relied on as indicating that the act results in an unlawful interference with the bank's functions as a governmental agency. In the case at bar, the *Abilene Bank* case, *as decided the other way* in the U. S. Circuit Court, and as reported in 175 Fed. R. 365, was exten-

sively quoted from and much relied on, in the bank's argument before the Supreme Court of Vermont; and that court in its opinion—Record pp. 39 and 46, fols. 76 and 93—examines the opinion of the Circuit Court, and clearly distinguishes the case from the one at bar, in that the Vermont act does not subject the bank to the visitorial requirements of the Kansas act, and does not regulate winding-up proceedings as the Kansas act assumed to do.

But we think the *Abilene Bank* case, as decided by the Circuit Court of Appeals, and as now cited by the bank here, tends to support our position, rather than that of the bank, on the question whether state legislation is necessarily void if it tends to affect the business of National banks.

That was a case brought to test the validity of the Kansas Bank Depositors' Guaranty Act—which, like our act, was purely optional. In the Circuit Court, the Kansas act was held unconstitutional, for that as National banks could not lawfully avail themselves of its provisions, they were denied the right of free competition, were unjustly discriminated against, and were deprived of their equal rights under the Fourteenth Amendment. The Circuit Court of Appeals, while recognizing the fact that National banks could not lawfully avail themselves of the option, held that the law was not invalid therefor; and in reversing the decision below, says, 179 Fed. R., p. 465:

> "It is urged that the statute is void because the effect of its operation will impair the efficiency of the National banks as instrumentalities of the National government by attracting depositors from

them to the guaranteed state banks. If this contention is sound, and the statute falls, then all state legislation designed to improve banking methods and to maintain the local institutions on a sound basis and secure the depositors from loss is likewise void. Indeed, it will be impossible to uphold even the creation of banking corporations by the States, for it can be said with equal if not greater reason that by merely giving them corporate existence and allowing them to enter the field of competition for business, they deprive the National banks of depositors they would otherwise secure, and thereby impair their efficiency. To state the proposition contended for is to demonstrate its unsoundness. . . . . It is doubtful that it ever occurred to a railroad corporation chartered by Congress that a statute providing for public aid to a railroad corporation organized under the laws of a State is void, because its ultimate effect would be to create an unfair competition and deprive the former of business, thereby lessening its efficiency as a governmental agency. The contention here made is not different in principle. The effect of the Kansas statute upon the business of the National banks will at the most be indirect and incidental. Whether there will be any appreciable effect at all depends upon the individual views of the depositors, which ordinarily are influenced by many things pertaining to banks and bankers and their methods of conducting business. There can be none in a legal sense of which a court can take cognizance, in a case like this. Ground for complaint would exist if the statute had, for instance, made it an offence to deposit funds in National banks, or subjected them to a higher rate of taxation than that imposed on like deposits in state institutions, or in some other perceptible way had evinced an

> evil and discriminating purpose, or an attempt to subject them to rules inconsistent with those prescribed by Congress."

Elsewhere in this brief (p. 61) is discussed the proposition that the State might have made the bank its agent for the collection of the taxes against the depositors, the reason for the theory thus advanced being that except in instances where the state laws would violate the National Bank Act, or would impair the bank's governmental functions, the bank is as much subject to such laws as any corporation would be. The cases there cited are referred to in this connection.

Keeping clearly in mind the fact that the bank itself is not taxed, the following expression of Mr. Justice Miller in *Nat. Bank v. Commonwealth*, 9 Wall. 353, 362, seems decisive of this phase of the case:

> "It is only when the state law incapacitates the banks from discharging their duties to the government, that it becomes unconstitutional."

There is a numerous line of cases, of which *Western U. Tel. Co. v. Att'y Gen'l of Mass.*, 125 U. S. 530, is a fair type, holding that agencies of the Federal government are exempt from state taxation only in so far as such taxation may interfere with or impair their efficiency in performing the functions by which they serve the Federal government. Such cases are not in point here as establishing the right of the State to tax the bank beyond what the Federal statute permits; but they do go to the point that state laws not in contravention of the Federal statute, though relating to and affecting National banks, are valid.

The case is utterly devoid of any circumstance tending to show that by reason of the stipulation any of the bank's obligations to the Federal government were in the slightest degree impeded. Nothing is claimed to have been done or omitted by the bank, as a result of the law, calling for the interposition of the Federal government; and an examination of the National Bank Act fails to disclose any ground on which it could interpose.

But it is argued (bank's brief, pp. 22-27) that the amount payable under the stipulation is a franchise tax on the bank; and on p. 20 of the bank's brief, attention is called to the fact of a similarity of rate, etc., the argument being that as the rate of the franchise tax on savings banks and the rate agreed to be paid by National banks is the same, the latter is therefore a franchise tax. Is this position tenable?

Referring again to *Owensboro Nat. Bank v. Owensboro,* 173 U. S. 664: The statute there considered undertook to tax the franchise or intangible property of the bank, and it was argued that while such tax was not in form imposed on the shares of stock in the names of the shareholders, nevertheless it was equivalent to such a tax on the shares, and therefore was not violative of the Act of Congress. But the court held that such was not its legal effect. Quoting from the opinion of the court, by Mr. Justice White, at p. 683:

> "It may be that in the case before us there is a coincidence between the sum of the tax levied upon the corporation and the amount which would have been imposed had the shares of stock in the names of the shareholders been assessed according to the

> Act of Congress. But that this is not the necessary result of the taxing statute is too plain to require comment."

This, we think, answers the argument that because there may be a coincidence between the rate of the franchise tax imposed on savings banks by Pub. Sts. of Vt., secs. 744-746, and the rate the bank has agreed to pay on the average amount of its interest-bearing deposits, therefore the latter is in legal effect the same thing as the former, to wit, a franchise tax.

But it is to be observed that in no event could there be a coincidence as regards the amount payable to the State; because in computing the franchise tax on savings banks, both commercial and interest-bearing deposits are taken as the base.

> *State v. Franklin County Sav. Bank, etc.*, 74 Vt., 246.

Then, too, as the law stood when this stipulation was executed, in getting at the taxable amount of average deposits in mutual savings banks, they were allowed to make the following deductions:

> 1. Average amount of assets, not exceeding ten per cent. thereof, invested in United States government bonds.
> 2. Excess of individual deposits over $2,000 actually taxed to depositors in towns in Vermont wherein they reside.
> 3. Average appraised valuation of real estate held by the bank.
>
> Pub. Sts. of Vt., sec. 744.

And trust companies, and savings bank and trust companies, were allowed the first two deductions above named.

Pub. Sts. of Vt., sec. 745.

Under the act and the stipulation, National banks were not allowed to make any of the above deductions, but were allowed to make the deductions enumerated in Pub. Sts. of Vt., sec. 819—none of which were permitted to be made by the state institutions, viz.:

> Sec. 819. The provisions of this chapter shall not apply to municipalities nor to corporations organized solely for charitable, educational or religious purposes; nor to railroad, insurance, guaranty, express, telegraph, telephone, steamboat, car, transportation, sleeping car, parlor car, mortgage, loan or investment companies; nor to savings banks, trust companies, and savings bank and trust companies, which have interest-bearing deposits in national banks; nor to national banks having an interest-bearing deposit in another national bank; nor to any person having any sum of money on deposit in a national bank whereon interest not exceeding the rate of two per cent. per annum is paid or allowed him by such national bank.

Thus it will be seen that there never could be any actual equivalence in amount; that the franchise tax on savings bank is an entirely different thing, and based on entirely different considerations; and that the mere coincidence in the rate affords no test of legal similarity between the franchise tax on state institutions and the amount payable under the stipulation, but rather indi-

cates that the purpose and intent of the legislature was that intangible property similarly situated should ultimately bear approximately the same burden for the support of the government.

On p. 30 of the bank's brief, it is said that "the tax is on the bank itself because it cannot recoup from the depositor the amount of the tax paid by the bank."

Inasmuch as it has never attempted to recoup, and its advertisements show that it does not intend to, we suggest that this question is not one arising upon existing facts, nor upon rights sought to be enforced, and that it presents, essentially, a moot question.

During the period covered by the stipulation in suit, and prior thereto, the bank advertised that it would pay the interest and "also pay the taxes;" that the depositor had "no reports to make, or taxes to pay;" that "we pay taxes on deposits of any amount;" that "all taxes are paid by the bank," etc. (Record, p. 18, Art. XVI.)

Nor does it appear that for any period covered by a previous stipulation the bank ever became involved in any controversy with its depositors or suffered in any way by reason of the recoupment provisions of the law. The bank clearly could recoup, without difficulty (if it cared to try it in view of its assurances to its depositors) for payments made on deposits actually in the bank April 1, 1909—referred to in clause (c), p. 31 of its brief—because the depositor himself would have been liable for the tax but for the stipulation (sec. 809, 814), and the bank had the right to make return and payment on April 1, if it chose (sec. 818), though not compelled to make the payment until April 30. Hence had these depositors actually withdrawn this whole amount of

$74,575.28, referred to in the above cited clause, on April 1, the bank could have deducted therefrom what it had paid or was liable to pay to the State. But the supposition that they would have withdrawn a dollar on April 1 is absurd—assuming that they were honest; for if they had the money in their hands on that date it would become subject to the higher tax rate of their particular town, if listed there for taxation. (Pub. Sts. of Vt., sec. 536, 543, 3531; Record, p. 17, Art. XIII.)

Likewise the reasoning and figuring of the bank on p. 32 of its brief is, we think, erroneous. The stipulation is not that the bank will pay on the amount of deposits on hand at the date of the stipulation, October 1, 1908, but on the average amount during the six months ending March 31, 1909.

But all this computation and speculation as to what the depositors may do as to withdrawals, seems to us to be beside the question. The amounts involved in Art. VIII. and IX. of the agreed facts—Record, p. 16—showing what the depositors did withdraw during the period in question, are relatively insignificant. The risk of withdrawals is but an ordinary incident of the business, and one which the bank may well have had in mind when it signed the stipulation. We think the reasoning of the state court satisfactorily answers the bank's objections. Quoting from the opinion:

> "It appears from the facts stated that because of a constant fluctuation in the amount of the deposits, and the effect of the rules for allowing and crediting interest, the relation of the individual depositor to the total amount of deposits at any date, and the average of deposits for any period, is constantly

> changing . . . . The fluctuations attending the business of carrying deposits, the problems that would be presented by an attempt at an apportionment, and the probable inability to recoup the full amount called for by the stipulation, are not matters which have been discovered by experimenting with the law, but matters which were well known to the bank before the stipulation was filed. . . . The agreement evidently arose from the bank's ability and willingness to pay the current rate of interest on savings deposits, and also the taxes of the depositors as represented by the proposed average. It may well be supposed that if the defendant had been looking to a recoupment, and had considered a recoupment impracticable, it would not have entered into the stipulation." (Record, pp. 42, 44, 46; fol. 84, 88, 89.)

The recoupment clause is merely optional. (Sec. 814.) The bank never undertook to invoke it, and its advertisements indicate that it did not intend to for the period covered by this stipulation; and, in this view, the case stands as if no such clause were in the law. As the state court said:

> "No deduction under the statutory permission has been made or attempted, and the depositors are not the party complaining." (Record, p. 44, fol. 88.)

And for the period in question, the bank advertised that it would pay the taxes *on average deposits,* and that the depositors would receive 3½ or 4 per cent. interest, *tax free*—the first named rate being as much as the state institutions could lawfully pay, and the last named rate being more. (Pub. Sts. of Vt., sec. 4663.)

In the circumstances, we fail to see any concrete question before this court as to recoupment.

The bank's interest-paying dates are January 1 and July 1, and sums withdrawn prior to such dates are not allowed interest. (Record, pp. 14, 15, Art. XII.) The bank now makes some objection because the average deposits on which it has agreed to pay include sums on which it did not actually pay any interest because of withdrawal before the interest-paying date. The bank had the use of this money for nothing from the last interest-paying date until its withdrawal; and it doubtless anticipated this when it signed the stipulation, for the record shows that it "has made payments under previous stipulations like the one in question, and in so doing it has treated all these deposits (as deposits) upon which it would pay or allow interest at the aforesaid rates, notwithstanding some of them were held and withdrawn as above stated." (Record, p. 32, fol. 60.) The words *"as deposits,"* inserted in the above quotation in parenthesis, are omitted from the Record, but are in fact in the opinion. (See 84 Vt., p. 178; 78 Atl. Rep., p. 948.)

It is not contended by the State that the fact that the bank had paid under prior like stipulations operates to estop it from contesting this suit; but its previous line of conduct affords ground for the conclusion that when it signed the stipulation in suit it knew from past experience just how it would operate—whether to its detriment or otherwise.

We see no necessity for argument as to the convenient and advantageous features of the proposition made by the State and accepted by the bank. We can add noth-

ing in this regard to the apt and convincing statements contained in the bank's advertisements; and we might well dismiss this phase of the case with these suggestions:

If the sum to be paid by the bank is a tax on the bank, that ends the case—the State cannot recover. But if it is not a tax on the bank, in any proper sense, and if the stipulation be *intra vires* and otherwise legal, then *it makes no difference what the basis of computation is*, so long as the bank agrees to pay on such basis. If a bank considers the proposition unsafe or inexpedient, it need not agree to it; but if it does agree, no sound reason is perceived why it should not be made to keep its promise.

Suppose there had been no provision in the statute that the bank might recoup. The bank then could have, by its power to change the rate of interest, recouped itself. To the depositor to whom it was paying four per cent., it could have changed the rate to three and three-tenths per cent. By paying the amount of the depositor's tax itself, the bank is left on a par with the state banks. The latter have to pay the seven-tenths of one per cent. per annum out of their earnings. So this bank can meet the state banks on a level. Viewing the situation from any angle there is every time disclosed the absolute equity of this law, and this phantom of the "lack of power to recoup" fades away when we consider that the bank has

1. The power itself to recoup by changing the rate of interest.
2. An absolute equality, any way, with its competitors, the state bank, even if it pays the

> tax for the depositor, and does not undertake to recoup further.

But the cases cited by the bank, in connection with the question of recoupment, are clearly to be distinguished from the case at bar. (Bank's brief, p. 31.) They are—

> *Farmers & Traders Bank v. Hoffman,* 93 Iowa 119,
> *New Orleans v. Houston,* 119 U. S. 265,
> *Boston v. Beal,* 51 Fed. R. 306,
> *Stapylton v. Thaggard,* 91 Fed. R. 93,
> *Aberdeen Bank v. Chehalis County,* 166 U. S. 440.

In each of the above cases, the statute made the party from whom recovery was sought *primarily liable* for the tax, and in the bank cases, gave such party the right to deduct what was paid from credits of stockholders in its hands, or created a lien on the shares.

Had the Vermont statute *required* the bank to pay in the first instance, the above cited cases might be in point.

We call special attention to the fact that in the *Aberdeen Bank case,* which the bank cites, this court held that it was bound by the decision of the state court that the statute did not impose a tax on the bank. Such is the holding of the Supreme Court of Vermont, in respect of this act; for it says:

> "The statute lays the tax upon the depositor in so many words." (Record, p. 34, fol. 64.) . . . "The use of the term 'a tax' cannot be given an effect adverse to the state's claim, for the agreement

proceeds to say that it is made for the purpose of carrying out the statutory provisions which relieve the depositors from making the returns and paying the tax." (Record, p. 42, fol. 83.)

In the *Aberdeen Bank case,* one section of the statute, taken by itself, indicated an intent to tax the capital of the bank unlawfully; but another section disclosed that the intent was to tax the shares to the owners; and this court said, 166 U. S., p. 444:

> "The Supreme Court of Washington held in this case that the two sections are to be read together, and that, so read, their provisions are not inconsistent with those of the Federal statute. That these two sections of the state law should be read together is obviously proper, and, at any rate, we are bound by the judgment of the Supreme Court of the State in the mere matter of the construction of that law."

(B) DURESS.

The bank further urges in its brief, p. 33, that "the statute is by design and in effect and reality a duress upon National banks, compelling them to execute the stipulation to retain their depositors," and on this point, on pp. 35-38, are cited

Swift v. United States, 111 U. S. 22,
Maxwell v. Griswold, 51 U. S. (10 How.), 241,
Robertson v. Frank Brothers Co., 132 U. S. 17,
and
Gaar, Scott & Co. v. Shannon, 223 U. S. 468.

These cases, it will be observed, all relate to positive

demands made for illegal taxes, fees, or other exactions, the refusal of which would work an actual detriment to the party from whom demanded, by way of penalty, or, as in the *Swift case,* by total impairment of business; whereas, in the case at bar, the State demanded nothing of the bank. The cases cited disclose that the parties subjected to duress had actually suffered some loss in consequence, and were suing for what they claimed to have paid or parted with by reason of the duress. But in the case at bar, the facts show that both the bank and its depositors had actually been benefited—the bank by an increase of business, and the depositors by an increase in the interest rate.

Will this court theorize and speculate, and assume that a single dollar would have been drawn out, had the bank failed to sign the stipulation? Repeating a quotation from *Dolley v. Abilene National Bank,* 179 Fed. R. 465:

> "Whether there will be any appreciable effect at all depends upon the individual views of the depositors, which ordinarily are influenced by many things pertaining to banks and bankers and their methods of conducting business. There can be none in a legal sense of which a court can take cognizance in a case like this."

The court has just as much right to assume that the depositor's confidence in the business methods of this bank, or his belief that the state banking system did not make his investment so secure, would more than counterbalance the tax exemption feature of savings bank deposits, and would lead him to prefer to have his deposit remain in the National bank. It is all guess-

work, anyway; but the record would indicate that the last-named assumption is warranted—for it appears from the agreed facts (Record, p. 14, art. II., fol. 31), that the bank for some years prior to the enactment of this law, and while its depositors were subject to the higher tax rate of their particular town, maintained a "savings department," and did not lack for business therein. And the bank itself finds fault with the Vermont court for ignoring this very fact; for it says, at the bottom of p. 46 of its brief, that said court "overlooks the fact that the bank had the deposits before the State sought to tax them." Again, on p. 21 of the bank's brief, counsel say that "the deposits were there before the passage of the statute to tax them." Would the bank be more likely to lose its deposits under a scheme taxing them at seven-tenths of one per cent. than under an average tax rate of $16.70 per $1,000?

The only escape from entanglement in the meshes of their own reasoning is for the bank's counsel to argue that its depositors were a set of tax-dodgers and perjurers, who would fail to list their deposits for local taxation under the old law, and bid defiance to the town or state authorities because the bank's books were immune from their inspection.

If, as we contend, the bank's contract with the state was *intra vires*, no duress can be established, for the contract was not extorted by an unlawful demand—indeed, there was no demand whatever.

But suppose that duress was in fact exercised—*the bank ratified the contract by accepting the benefit it conferred, and by publicly advertising the effect of such*

acceptance as a means of inducing business. (See agreed facts, art. XIV., Record p. 18.)

Contracts made under duress are not void, but voidable merely; and one who, after its execution, has ratified a contract by accepting its benefits, cannot afterward avoid it on the ground of duress; and ratification may be shown by subsequent conduct.

> *Carver v. United States,* 111 U. S. 609.
> *Connolly v. Bouck* (C. C. A.), 174 Fed. R. 312.
> *Schee v. McQuilken,* 59 Ind. 269.

Again, what constitutes duress is a question of law—but whether duress has been actually exercised is a question of fact.

> *Clement v. Buckley Mercantile Co.* (Mich.), 137 N. W. 657.
> *Galusha v. Sherman,* 105 Wis. 263, 47 L. R. A. 417.

And in so far as this is a question of fact, the following extracts from the state court's opinion are significant:

> "In this case (referring to *Larabee v. Dolley,* 175 Fed. R. 365), it was alleged by the complainants and admitted by the demurrer that the act was intended to deprive National banks of their customers and business, and that this was the effect of the act in operation. *Here there is no finding of any such intent or effect.*" (Record, p. 39, fol. 77.)

Now duress is but a species of fraud—*Brainard v. Van Dyke,* 71 Vt. 359, 365; and it is fundamental that fraud in fact must be found by the trier of fact—it will not be presumed.

Quoting again from the opinion below:

> "It is clear from what has been said that the action of the defendant was *freely and understandingly taken.*" (Record, p. 44, fol. 89.)

A fair test of the question of duress would seem to be this: Had the bank paid according to the stipulation, could it have recovered the money back on the ground that the payment was not voluntary?

We submit that it could not, because it is found that the action of the bank in agreeing to pay was "freely and understandingly taken."

Neither the state's court decision of this question nor the bank's brief here on that subject discusses or presents any Federal question. Both treat it as a matter of general law; and this consideration alone is enough to uphold the state court's decision in the matter. The fact that the party who signed the contract is a National bank does not require the application of any other or different principles in solving the question whether duress has been exercised, than in the case of contracts between private individuals.

But even had any Federal question in this connection been considered and determined by the state court, the case of *Gaar, Scott & Co. v. Shannon,* 223 U. S. 468—cited by the bank on the subject of duress—affords ground for maintaining that this court will not consider it; "for," as said in the case cited, "as repeatedly ruled, where a state court has decided against the plaintiff in error on a matter of general law broad enough to sustain the judgment, the court will not consider the Federal questions, even though they may have been actually

considered and determined adversely to his contention."

In the case cited, it is further held that if a Federal question is *properly presented and necessarily controls,* then the appellate jurisdiction of this court is not defeated merely because the decision below is put upon some matter of local law; but the difficulty with the bank's case is that it did not urge any Federal question in respect of the matter of duress, nor did the state court rest its decision of that matter on the determination of any Federal question. And, applying the language of this court in the case cited (p. 473), the decision of the state court *"on that non-Federal point,"* properly disposes of this phase of the case here.

(C) INTERFERENCE WITH EXISTING CONTRACTS BETWEEN THE BANK AND ITS DEPOSITORS.

This is subdivision (3) of the bank's "second point," and is discussed on pp. 38-40 of its brief.

To the argument that the interest rate is liable to be reduced because of the act, it is a sufficient answer to say that the state's claim against the bank, as the Vermont court finds, "is not contested by the persons whose property is chargeable with the amount to be paid," (Record, p. 32, fol. 61), and that "the depositors are not the party complaining." (Record, p. 44, fol. 88.) The familiar rule that a statute can be assailed only by those whose rights are injuriously affected thereby seems applicable here.

Collins v. Texas, 223 U. S. 288.
Turpin v. Lemon, 187 U. S. 51.
Red River Valley Nat. Bank v. Craig, 181 U. S. 548.
Albany County v. Stanley, 105 U. S. 305.

As between the state and the depositors—even were they contesting the validity of the tax—it is clear that no objection on the score of impairment of contract could be made; for all contracts are made with reference to the taxing power of the state, and are subordinate to it. The state has a right to enact tax laws that may incidentally affect the profit arising from a contract; but this does not unlawfully impair the contract, "because it was made subject to just that kind of impairment."

> *Rutland R. Co. v. Central Vt. R. Co.*, 63 Vt., 1, 23.

In the case cited, a state law was considered which obliged a lessee to pay taxes on the gross earnings of the leased property, and permitted a deduction thereof from the rent due the lessor.

Nor would the depositors themselves have any standing as complainants, were they in court; for the State has fixed the tax rate below the lowest local rate to be found in the State.

Record, p. 17, art. XIII.

But there is no contract to be impaired, in any view of the case; *for the bank has not agreed to pay the depositors any specified rate of interest.* And on p. 81 of its brief, in discussing another point, the bank unguardedly cuts all merit out of its claim of "interference with existing contracts" by the assertion that *"the bank reserves the right to change the rate of interest."*

"Interest at such rates as may be fixed by the board of directors" is all the bank has contracted to pay.

(Exhibit D, "Conditions of Deposit," p. 24 of Record.) And in one set of pass books "the said bank reserves the right to change the rate of interest upon any deposit in this book at any interest period . . . . or to discontinue all interest thereon." (Exhibit E, p. 25 of Record.) The case does not show what proportion of the averages given in art. VI. of the agreed statement (Record, pp. 15, 16), relates to certificates of deposits, but it appears that in practice the bank has treated both classes of deposits alike in computing the averages on which it would pay interest. (Agreed statement, art. III., Record p. 15.) Such certificates reserve to the bank the right to "discontinue the interest or pay off the principal." (Exhibit F, Record p. 26.) So the transaction evidenced by a certificate amounts in effect to a loan by the depositor to the bank, the borrower having the right to alter or discontinue the contract at its pleasure. It is not pretended that any contract with any depositor of any class has been impaired or interfered with; and the bank's advertisements show an increase instead of a decrease in the interest rate.

The statement in the bank's brief—p. 39—that "seeking to exercise the attempted unlawful authority given it by the act, it pays the depositor two and three-tenths per cent. interest and the other seven-tenths turns over to the State," if intended as a narrative of something that has actually happened, is entirely unwarranted; and, if intended as a prediction, the bank's course in the past fails to justify it.

In pressing this claim that the act interferes with existing contracts between the bank and its depositors, it is not entirely clear whether the bank is complaining

in its own behalf, or for its depositors. We do not consider the relation between the bank and its depositors to be such that it can interpose for them—though the case might perhaps be otherwise were the bank a savings institution. (*Provident Institution for Savings v. Malone,* 221 U. S. 660.) The relation between this bank and its depositors differs from that existing between savings banks and their depositors. In this case, the relation is that of debtor and creditor. But the depositor in a savings bank does not loan the money deposited. He entrusts it to the bank as his trustee; if there is a profit he receives it, if there is a loss he shares it. (*State v. Peoples Nat. Bank,* 75 N. H. 27.)

But assuming that the bank is complaining for itself, it would seem that when it "freely and understandingly" entered into this agreement with the State, it waived its right to assert in its own behalf that its contracts with its depositors would thereby be affected. *Volenti fit non injuria.* If the contract be *intra vires,* and if the bank voluntarily entered into it, it would seem that it cannot complain of the results.

A voluntary course of action often subjects a party to liabilities that would not be incurred had he not volunteered. Thus, in *Consumers Ice Co. v. Hatch,* 224 U. S. 148, it appeared that a clause in the charter of a water company stated that it should not be *required* to lay its mains in ungraded streets, but did require it to supply water "without distinction of persons." The company *voluntarily* laid its mains in an ungraded street, and then refused to make service connections with the dwelling of a certain resident thereon, save at his expense, though supplying others on the same street at

regular rates. The company contended that to require it to connect with the particular dwelling would amount to an impairment of contract; but the court held the claim to be without merit, as the company had voluntarily laid its mains in the ungraded street, and was supplying water therefrom to other residents thereon.

On p. 39 of its brief, the bank makes the point that no taxes have actually been assessed against the depositors, no valuation made, and no returns or reports made, and therefore the depositor had not become liable to pay the tax to the State. This point is elaborated by the bank at pp. 75-89 of its brief, and will be considered in discussing the branch of the case there treated.

But we here suggest that the bank is in no situation to urge these points; *for whatever has been omitted by the State or by the depositors has been because of the bank's action in executing the stipulation.*

Had the bank kept its hands off, the rights of the State as against the depositors would have been preserved.

The claim that the act provides for the taking of the depositors' property without due process of law more properly falls within the constitutional questions hereinafter discussed, and will be then considered; but here, as in the case of the alleged interference with existing contracts, it will be borne in mind that the persons whose property is claimed to have been taken are not complaining.

(D) THE STATE MIGHT COMPEL THE BANK TO PAY EACH RESIDENT DEPOSITOR'S TAX, IN THE FIRST INSTANCE.

A discussion of this point is material in this view: If the State could have compelled the bank to pay taxes

for its depositors, out of their funds in its hands, it certainly can enforce a voluntary agreement to do something else in lieu of such payment.

As has been frequently stated in this brief, the bank's obligation to pay what is claimed to be due is something it has voluntarily assumed; but we believe that a law compelling the bank to pay taxes for its depositors would be entirely valid. The reasoning employed in cases where statutes have been considered which provide for the payment by a bank of taxes on its shares warrants the belief above expressed.

The leading case on the subject is

National Bank v. Commonwealth, 9 Wall. 353.

The statute under consideration in that case imposed a tax on bank stock, and required the bank to pay it. It was claimed that this was a tax on the bank, and hence forbidden by the National Bank Act. It was held that it was not the bank's capital that was taxed, but the shares thereof which were the property of the shareholders, and that, as taxation of such shares was expressly authorized by the Federal law, the state could make the bank its agent for their collection. We quote the following extracts from the opinion of Mr. Justice Miller (pp. 360-362):

> "But it is strongly urged that it is to be deemed a tax on the capital of the bank, because the law requires the officers of the bank to pay this tax on the shares of its stockholders. Whether the State has the right to do this we will presently consider, but the fact that it has attempted to do it does not prove that the tax is anything else than a tax on

these shares. It has been the practice of many of the States for a long time to require of its corporations thus to pay the tax levied on their shareholders. It is the common, if not the only, mode of doing this in all the New England states, and in several of them the portion of this tax which should properly go to the shareholder's contribution to local or municipal taxation is thus collected by the State, of the bank, and paid over to the local municipal authorities. In the case of shareholders not residing in the State, it is the only mode in which the State can reach their shares for taxation. We are, therefore, of opinion that the law of Kentucky is a tax upon the shares of the stockholders. . . . . It is only when the state law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional. We do not see the remotest possibility of this, in their being required to pay the tax which their stockholders owe to the State. If the State of Kentucky had a claim against a stockholder of the bank who was a non-resident of the State, it could undoubtedly collect the claim by legal proceeding, in which the bank could be attached or garnisheed, and made to pay the debt out of the means of its shareholders under its control. This is, in effect, what the law of Kentucky does in regard to the tax on the bank shares."

On the point that a National bank may be required to pay the taxes assessed on its shares, the case was followed in

Loinberger v. Rowse, 9 Wall. 468.

In *Merchant's, etc., Bank v. Pennsylvania*, 167 U. S. 461, a state law was considered which gave both state

and National banks the right to elect to collect from the shareholders a tax of eight mills on the dollar of the par value of the shares, and provided that if a National bank should fail to make such election it should report to the auditor the number and value of the shares, whereupon the auditor should assess a tax of four mills on the dollar of actual value of the shares, which the bank should collect of the shareholders and pay to the state. It was claimed that the act was one taxing the bank and not the shares. *Held*, that the bank was the mere agent of the state in collecting the tax, and that making it such was but a matter of procedure, and that there was no discrimination against National banks in the fact that state banks were not compelled to make such report and collect such tax, but the auditor looked to stockholders directly.

It was also held by this court that a statute of Vermont (now Pub. Sts. 517) is valid which requires the officers of National banks to transmit lists of its stockholders to the taxing officers of the various municipalities wherein resident stockholders reside.

Waite v. Dowley, 94 U. S. 527.

The above authorities are ample to show that National banks are not exempt from the rule that the state may collect lawful taxes through the agency of a corporation, and that such taxes are not against the corporation but against those for whom it pays.

On the general proposition, the case of *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, is much in point. The statute subjected bonds issued by a corporation to a tax of three mills on the dollar, and *required* the cor-

poration to pay it, and it was objected that this was taxing the corporation for property that it did not own. The court said that this was not true, in point of fact.

> "The corporation, as the debtor of its bondholders holding money in its hands for their use, namely, the interest to be paid, is merely required to pay the commonwealth out of this fund the proper tax due on the security. The tax is on the bondholders, not on the corporation. This plan is adopted as a matter of convenience, and as a secure method of collecting the tax. That is all. It injures no party. It certainly does not infringe the Constitution of the United States by making one party pay the debts and support the just burdens of another party, as is implied in the objection." (p. 239.)

As to the right of the State to collect taxes generally, through the agency of a corporation, see further

> *Haight v. Pittsburg, etc., R. Co.*, 6 Wall. 15.
> *Carstairs v. Cochran,* 193 U. S. 10, 16.

Nor is the method of collecting taxes through the agency of third persons a novel one in Vermont.

By Pub. Sts. of Vt., sec. 516, taxes assessed on the stock of non-residents are made payable by the corporation:

> SEC. 516. *Tax on non-resident's stock.* Taxes assessed on such stock of non-residents shall be paid by the corporation, and it shall hold such stock and the dividends thereon as security for such payment and may deduct the amount from any dividends payable to such shareholders. 1853, No. 37, § 1. 1849, No. 18, §§ 3, 4.

St. Albans v. National Car Co., 57 Vt. 68, it was held that a corporation could be compelled by mandamus to pay such taxes, and that a statute was constitutional which allowed the corporation so paying to deduct the taxes from dividends due the stockholders. It was claimed in that case that the statute was unconstitutional as taking one man's property to pay another man's debt.

Another instance is afforded by Pub. Sts. of Vt., sec. 827, making an administrator the state's agent for the collection of the collateral inheritance tax:

> SEC. 827. An administrator, executor or trustee having in charge or in trust a legacy or distributive share passing to a legatee or heir liable to a tax imposed by this chapter, shall, before paying or delivering the same to such legatee or heir, deduct the tax therefrom or collect it from such legatee or heir.

The foregoing discussion of what the state might do in the way of obliging a national bank to act as its agent for the collection of taxes is important only as showing that such banks are not entirely beyond the reach of state laws, and as suggesting this inquiry:

If a state can compel a National bank to pay taxes on the credits of taxpayers in the bank's hands, cannot it enforce a National bank's voluntary agreement to pay a stipulated sum which will effect a statutory discharge of all taxes which the state could oblige its depositors to pay?

An extract from the opinion in *Assaria State Bank v. Dolley*, 219 U. S. 121, seems somewhat in point. The court had previously decided in *Noble State Bank v.*

Haskell, 219 U. S. 104, that the provisions of the Depositors' Guaranty Fund Act of Oklahoma compelling contribution by state banks on an assessment based on average deposits was valid. The Kansas statute under consideration in the *Assaria State Bank case* did not compel contribution to the fund, but provided that in case of such contribution the depositors would have a preference over ordinary creditors in the event of the insolvency of the contributing bank. It was urged that the effect of this would be to drive a non-contributing bank out of business—a complaint similar to that made in the case at bar in the event that a National bank should not see fit to avail itself of the option provided by the Vermont act. But the court, speaking through Mr. Justice Holmes, said at p. 127:

> "If, as we have decided, the law might compel the contribution on the grounds that we have stated, it may try to bring about the same result by the creation of motives less compulsory than demand and of disadvantages in holding aloof less peremptory than an immediate stop."

This, of course, does not justify any claim that the State could compel the bank to sign the stipulation—and no such claim is made; but if the State might compel the bank to pay its depositors' taxes, may not it bring about a similar result, or provide for an agreement to pay something it will accept in lieu of the taxes, "by the creation of motives less compulsory than demand"?

(E) CONSTITUTIONAL QUESTIONS

The bank's "third point"—that there was no consid-

eration for the stipulation—has already been somewhat discussed in connection with its other points.

It is urged by the bank that, considering the tax as one on the depositors, it violates the Fourteenth Amendment, in that,

(A) It constitutes a denial of equal protection of the laws (brief, pp. 53-74); and
(B) It amounts to a taking of the depositors' property without due process of law (brief, pp. 74-89).

Under subdivision (A), the bank alleges divers unlawful discriminations; and under subdivision (B) that no valid assessment has been made or provided for, and that, if assessment has been made, it was without proper notice to the depositors.

As preparatory to our discussion of these propositions, we remark that in the myriad of decisions on the Fourteenth Amendment, this court has used numberless expressions, isolated quotations from which will afford comfort to almost anybody with almost any kind of a case, and on either side of it. It is futile, therefore, to undertake specifically to distinguish all the cases cited by the bank, or to comment particularly on all the quotations therefrom. The reasoning of the court in any of them is not, we submit, opposed to the constitutionality of this act. The questions here relate to the specific application of the principles concerning reasonableness of classification, equality of taxation, and due process of law.

Of all the cases cited by the bank, the *Bell's Gap case*, 134 U. S. 232, is perhaps nearest to the case at bar; and we consider it decisive of some of the phases of our case.

The assessment therein considered was upheld—it being one made by operation of the law, not upon actual valuation and notice, and requiring nothing further than the return of the treasurer of the corporation to fix the amount of the tax. And so here—no actual official valuation is required. It is of no consequence whatever. Upon the return of the depositor, the operation of the statute is automatic.

And the suggestion is here repeated that the bank really has no standing as an assailant of the statute on grounds affecting only the depositors' rights. (See authorities cited at p. ~~27~~ 57 hereof.)

The only possible relevancy which the objections now considered can have is on the question of consideration —the argument being that if the provisions for taxing the depositors are invalid, then the State gave up nothing in exchange for the bank's stipulation. But in view of the state court's conclusion that the case affords indications that "National banks are benefited by the act" (Record, p. 39, fol. 77), it would seem that no further inquiry as to the fact of a sufficient consideration is needful.

9 Cyc. 311.

The State, however, does not seek to avoid a discussion of the constitutional questions raised by the bank; and all the matters urged under its "third point" may be treated under the broad inquiry,

Is the tax imposed on the depositors void, because of inequality, discrimination or other illegality?

Before discussing the particular features of this law

which are claimed to render it objectionable on account of inequality or discrimination, it is well to consider that there is no imperative requirement that taxation shall be equal. If there were, the operations of the government must come to a stop, from the absolute impossibility of fulfilling it.

It is inevitable that some property is taxed twice, and some escapes taxation altogether. Changes in methods of taxation, and difference in results are often required on the grounds of public policy, and more effectually to reach the various sources of revenue. The State has the right to search out new classes as subject matter of taxation, and to devise new methods; and perfect equality cannot be attained.

> "Approximation to it is all that can be had. Under every system of taxation, however wisely and carefully framed, a disproportionate share of the public burdens will be thrown on certain kinds of property because they are visible and tangible, while others are of a nature to elude vigilance. It is only when statutes are passed which impose taxes on false or unjust principles, or operate to produce gross inequality, so that they cannot be deemed in any sense proportional in their effect on those who are to bear the public charges, that courts can interpose and arrest the course of legislation by declaring such enactments void."

Com. v. Savings Bank, 5 Allen 428, 436.
Allen v. Drew, 44 Vt. 174, 186.
Tappan v. Merchants Nat. Bank, 19 Wall. 490, 504.
First Nat. Bank v. Chapman, 173 U. S. 205, 216.

But it would seem that if uniformity of taxation is the one thing desirable, a law of this character is a long step in that direction. Those who have made a special study of the matter seem well agreed that a low, uniform rate of taxation upon intangible property is desirable, as tending to lessen the inequalities that obtain under the ordinary system. The difference in local tax rates among the towns of Vermont is so striking as to be grotesque. With such rates ranging from $39.80 to $7.50 per $1,000 (Record, p. 17, art. XIII.), it is apparent that the act, instead of breeding inequality, is promotive of absolute equality among those of the class affected.

The Fourteenth Amendment was never intended wholly to forbid "class legislation," and discriminations are not prohibited provided they are reasonable and the law applies alike to all of the particular class affected.

Atchison, etc., R. Co. v. Matthews, 174 U. S. 96.
Giozza v. Tiernan, 148 U. S. 657.
Pacific Express Co. v. Seibert, 142 U. S. 339.
Savings, etc., Ass'n v. Multnomah Co., 169 U. S. 421.
Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283.

In *Merchants & Mfrs. Nat. Bank v. Pennsylvania,* 167 U. S. 461, it was claimed that the statute there in question discriminated against National banks. In disposing of this contention, the court said, p. 463:

> "It (the alleged discrimination) is not in terms and conditions expressed in the statute, but only in the possible results of its operation . . . . Lack of uniformity in result furnishes no ground of

complaint under the Federal Constitution. Suppose for any fair reason, affecting only its internal affairs, the state should see fit wholly to exempt certain named corporations from all taxation. Of course the indirect result would be that all other property might have to pay a little larger rate per cent. in order to raise the revenue necessary for carrying on the state government, but this would not invalidate the tax on other property, or give any right to challenge the law as obnoxious to provisions of the Federal Constitution."

In the same case, as reported in 168 Penn. St., at p. 320, attention is called to two classes of rates—one where the bank elected to pay and one where it did not—and it was said:

> "The rate is uniform for each class. . . . . The banks themselves are responsible for the existence of the second class. They are invited to deal directly with the state. If they do not, it is fair to assume that they are guided by what they believe to be their own pecuniary interest. Of a want of uniformity which is the result of their own deliberate action, they certainly ought not to complain."

The quotation last made is strongly relevant to a point previously considered—that the bank cannot complain of the results of its "own deliberate action" in signing the stipulation in suit.

We here repeat a quotation from *Kentucky Railroad Tax Cases,* 115 U. S. 321, 337, made by the bank at p. 54 of its brief:

> "The rule of equality, in respect to the subject, only requires the same means and methods to be

applied impartially to all the constituents of each class so that the law shall operate equally and uniformly upon all persons in similar circumstances."

To which we add the following from the opinion in *Atchison, etc., R. Co. v. Matthews,* 174 U. S. at p. 106:

> "Indeed the very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

And we likewise adopt, as part of our argument, the opinion in *Bell's Gap Railroad Co. v. Pennsylvania,* 134 U. S. 232, cited in the opinion of the state court (Record pp. 36, 37, fols. 70-73), and particularly that portion quoted at p. 55 of the bank's brief.

The authorities cited and quoted from on pp. 56-58 of the bank's brief are also exactly in point.

There is no dispute as to what the law is. We only maintain that the Vermont act conforms to the very tests insisted on by the bank.

Taking up, in interrogative form, the points urged by the bank in this connection, in the order followed in its brief:

(A). EQUAL PROTECTION OF LAWS.

(1) *Is the selection of depositors in National banks to form a class for the purpose of assessing a state tax an arbitrary classification?* (Bank's brief, p. 58.)

The drift of the bank's argument of this question is to the effect that the State must confine itself to one system and one rate of taxation for all—to the "iron rule of

equal taxation" which the bank's twice cited *Bell's Gap case* says is not compelled by the Fourteenth Amendment. (134 U. S. p. 237.) Or, to put its contention in the language of the state court (Record, p. 37, fol. 73), discrimination is claimed "against depositors in National banks by singling them out from all other taxpayers, and requiring them to pay a state tax upon a certain class of debts due them; that this tax is at a different rate, and required to be paid at different times and by different methods from what is required of other taxpayers, and of them as to their other property; that they alone of all taxpayers are required to make returns disclosing the banks where they have deposits and the amount of their deposits; and that the act discriminates against depositors in National banks whose deposits are not on interest in that it leaves them subject to taxation at the full local rate."

Throughout this phase of the discussion, the bank treats the various objections as being those which the depositors might make were it sought to enforce the payment of taxes by them. Hence, unless the depositors themselves could assail the validity of the tax for the reasons urged, the bank cannot.

It being an admitted fact that the act gives the depositors the benefit of a uniform rate, lower than the lowest local rate in the State, they surely would not be in a situation to complain, so far as the rate itself is concerned. What possible standing in this regard, then, has the bank?

But, passing that, we submit that the Fourteenth Amendment precludes none of the things to which objection is here made. The situation confronting the

State was one whereby large sums of money might readily escape all taxation unless some means were devised to bring it to the surface. The State's authority would seem to be limited, in its attempt to reach this class of property, to such inquiries as could be made in a suit at law for the recovery of a tax against the depositor, or in a prosecution against the depositor for perjury. This very fact affords a reasonable basis for classifying National bank depositors, and adopting a special method of reaching them,—if this court feels called upon to search for one.

If any further reason were needed to justify classifying the two kinds of depositors, and adopting different methods to reach them for the purposes of taxation, it is proper to consider that the two classes of institutions are not the same. Space will not admit of a full comparison of their powers and duties, nor of a discussion of the relative merits of the two systems. Attention will be called to a few points of dissimilarity:

National banks are banks of circulation; savings institutions are not.

National banks may loan to their officers and directors as freely as to other persons. (2 Nat. Bank cases, 173.) In savings institutions this is prohibited or restricted, by the Public Statutes of Vermont, viz.:

> SEC. 4625. A trustee or officer of a savings bank or savings institution shall not, directly or indirectly, either for himself or as the partner of others, borrow or use its funds or deposits, or sign any note, as surety, upon which any of such deposits are loaned.
>
> SEC. 4656. No loan shall be made to an officer,

director or employe of any trust company, without the written consent of a majority of the directors; and such loan shall not, at any one time, directly or indirectly, exceed five per cent. of the capital stock actually paid in . . . .

National banks are prohibited from making contemporaneous loans on real estate security (U. S. Rev. St. 5137), while such security is a recognized form of investment for savings institutions, under the following limitations contained in the Public Statutes of Vermont:

SEC. 4648. *Mortgages; limited.* No investment of deposits and surplus by savings banks, savings institutions and trust companies shall be made upon mortgages of real estate, except upon first mortgages of unencumbered real estate; and the amount of such investments shall not exceed three-fifths of the cash value of the property mortgaged. Not less than one-sixth of the amount of such mortgages shall be upon real estate in this state, and not more than eighty per cent. of the amount of the assets shall be invested in mortgages of real estate; provided that not exceeding sixty per cent. of the amount of such assets may be invested in mortgages of real estate outside of this state. If the investment is on mortgages of unimproved or unproductive real estate, the amount of such investment shall not be more than forty per cent. of the value thereof; and no mortgage investment shall be made by such corporation except upon the written approval of at least three trustees of their board of investment.

The provisions as to examination, reports and winding-up of the two classes of institutions are also differ-

ent, and it may be an open question as to which class of institution affords the better security for its depositors. The *institutions* are of a different class, and we submit that the difference is so marked as to justify treating the deposits of one class as a separate and distinct form of investment from those of the other, when it comes to reaching them for taxation.

As a practicable way of reaching this class of property, *as the property of the depositors*, the State, by the act in question, held out the inducement of a low, uniform rate, under which National bank depositors would be less inclined to conceal from the listers the fact that they had such deposits; and, to give the banks an opportunity to place themselves in as advantageous a situation as the state institutions, the option of paying on average deposits was accorded.

What is there then, in the Fourteenth Amendment to prevent this change in the rate or method of taxation? It operates precisely alike on all of the class affected—"equally and uniformly upon all persons in similar circumstances,"—which is the test the bank itself correctly invokes.

In *Michigan C. R. Co. v. Powers*, 201 U. S. at pp. 292, 293, Mr. Justice Brewer, speaking for the court, says:

> "There is no general supervision on the part of the nation over state taxation, and, in respect to the latter, the State has, speaking generally, the freedom of a sovereign, both as to objects and methods."

And the court approvingly quotes the following from the Circuit Court's opinion:

> "There can at this time be no question, after the frequent and uniform expressions of the Federal Supreme Court, that it was not designed by the Fourteenth Amendment to the constitution to prevent a State from changing its system of taxation in all proper and reasonable ways, nor to compel the States to adopt an iron rule of equality, to prevent the classification of property for purposes of taxation, or the imposition of different rates upon different classes. It is enough that there is no discrimination in favor of one as against another of the same class, and the method for the assessment and collection of the tax is not inconsistent with natural justice."

It is true that in the State court the bank argued that the act was unconstitutional because it included non-resident depositors. That court held that such depositors were not included—and now the bank argues (brief p. 68) that the law is invalid because it includes only resident depositors!

To its inquiry—p. 68—"if the State can make a class of resident depositors, excluding non-residents," we answer that it would seem that it can and must so long as its taxing power is restrained by its territorial limits. As well might a poll taxpayer in Vermont contest his tax, because a man in California or Alaska is not required to pay such a tax *to Vermont.*

(2) *Does the act discriminate among the depositors constituting the class by the exceptions made in section 819?* (Bank's brief, p. 68.)

This particular question is here raised for the first time, and was not involved in the state court's decision. This court should not consider it.

Miller v. Texas, 153 U. S. 535.
Louisville & N. R. Co. v. Louisville, 166 U. S. 709.
Oxley Stave Co. v. Butler County, 166 U. S. 648, 653.
Green Bay & Co. v. Patten Paper Co., 172 U. S. 58, 67.
Capital Bank v. Cadiz Bank, 172 U. S. 425, 430.

If this question be properly before the court, it suffices to say that unless restrained by constitutional provisions, the legislature of a State has full power to exempt any persons or corporations or classes of property from taxation, according to its views of public policy or expediency.

37 Cyc. 885.

Each exemption contained in section 819 of the law is based on a substantial reason:

(a) By the Public Statutes of Vermont, municipal property and that for charitable, educational or religious use, is exempt from taxation, viz.:

> SEC. 496. The following property shall be exempt from taxation:
>
> . . . . . .
>
> VI. Real and personal estate granted, sequestered or used for public, pious or charitable uses; real and personal estate used by public and private circulating libraries, open to the public and not used for profit; lands leased by towns for educational purposes; and lands owned or leased by colleges, academies or other public schools, or leased by towns for the support of the gospel; and lands and buildings owned and used by towns for

the support of the poor therein; but private buildings on such lands shall be set in the list to the owners thereof, and shall not be exempt.

(b) The property of National banks is not taxable by the State except as permitted by the National Bank Act,

U. S. Rev. Sts., sec. 5219.

(c) The other corporations exempted from the tax imposed by this act are otherwise taxed, viz.: *(References are to Public Statutes of Vermont.)*

Railroads, Sections 705-720.
Insurance, Surety and Guaranty Companies, Sections 740-743.
Express Companies, Sections 731-733.
Telegraph Companies, Sections 734-736.
Telephone Companies, Sections 737-739.
Steamboat, Car and Transportation Companies, Sections 721-725.
Sleeping Car Companies, Sections 726-730.
Investment Companies, etc., Sections 747-751.

(d) The exclusion of deposits paying less than two per cent. interest from the benefits of the law finds justification in the encouragement thereby offered to people of small means to invest their savings under such advantages as this bank advertised—4 per cent. on deposits—no limit—no publicity—no tax,—etc.

(3) *Does the act discriminate between depositors in National banks and depositors in state Savings Banks and Trust Companies?* (Bank's brief, p. 70.)

In so far as the complaint of unlawful classification is urged under this point, that has already been disposed of.

As to the complaint of subjection to publicity—what is there in the Fourteenth Amendment forbidding the State to require taxpayers to disclose what taxable property they have, and where it is? True, depositors in State institutions need not disclose where their money is; but that is because it is already taxed in another way, to wit, by the state franchise tax in the computation of which each deposit is figured.

It is further suggested that "the act discriminates against depositors in National banks by allowing them no exemption, while depositors in state banks are not required to pay a tax on such deposits unless in excess of two thousand dollars." To this point we reply:

The taxes on savings bank deposits not in excess of $2,000 are paid by the bank, and the depositor pays local taxes on the excess only. The Sate clearly has the right to limit the individual deposior's exemption.

The alleged discrimination is not injurious to the National bank depositor; he cannot complain—much less can the bank. He can have any anount on deposit in a single National bank, at the low tax rate. His neighbor can have but $2,000 tax exenpt in any one state institution. Here is a fair counterbalance of advantage. In some instances the National bank depositor would be better off. To illutrate:

A has $5,000 in a National bank. If the bank does not sign the stipulation, he pays $35.00 in taxes, under this act. But for the act (taking the average local rate throughout the State), he would pay $3.50, or, taking

the highest local rate, $199.00, or the lowest, $37.50—in any event more than this act calls for.

B has $5,000 in a savings bank. He pays the local rate on $3,000 only. If he paid at the average rate, his tax would be $50.10; if at the highest rate, $119.40; and if at the lowest, $22.50.

It may be argued that a man having but $2,000 to invest would, if he deposited it in a National bank which did not sign the stipulation, have to pay $14.00 in taxes, whereas if he put it into a savings bank he would pay nothing directly; but this argument assumes that the interest rates would be identical under such an arrangement. During the period covered by the stipulation in suit, savings institutions could pay but three and one-half per cent. interest to depositors. Pub. Sts. of Vt.:

> SEC. 4663. The trustees of a savings bank or savings institution shall regulate the rate of interest or dividends, not to exceed one and three-fourths per cent. semi-annually upon the deposits therewith, in such manner that depositors shall receive, as nearly as may be, the profits of such corporation, after deducting necessary expenses, and reserving such amounts as the trustees deem expedient as a surplus fund for the security of depositors, which, to the amount of ten per cent. of its deposits, the trustees of such corporation may gradually accumulate and hold to meet any contingency or loss in its business from the depreciation of its securities or otherwise; but the trustees may classify the depositors according to the character, amount and duration of their dealings with the corporation, and regulate the interest or dividends allowed, so that each depositor shall receive the same ratable

proportion of interest or dividends as others of his class.

During this same period, or a part of it, the plaintiff in error was paying four per cent. If it had not signed the stipulation, it might have paid more—it certainly would not have paid less.

(4) *Does the act discriminate between depositors in National banks and individuals generally?* (Bank's brief, p. 70.)

It is suggested by the bank that the National bank depositor cannot deduct what he owes from the chose in action represented by his deposit, and pay taxes on the balance only, as can individuals generally under Pub. Sts. of Vt., sec. 549. If any reason need be given for this, it can be found in the advantage of the low, uniform rate fixed by the act on National bank deposits.

In treating this same objection, the state court uses this language—Record, p. 38, fol. 75—which we think answers it completely:

> "All that is required by the Federal Constitution is that one class be not deprived of a privilege enjoyed by the other under the same conditions. *Soon Hing v. Crowley,* 113 U. S. 703. Depositors in National banks and taxpayers under the general law are not in the same situation. One class pays a single tax to the State at a fixed rate which calls for an amount less than the average of taxes under the general law, while the other is subject to the greater burden and uncertain demands of local taxation. Those more heavily taxed on an average under the general law may well be allowed a reduction denied to those who take advantage of the opportunity afforded by the special act. Nor do

> we think the discrimination between the two classes of banks as regards the $2,000 limit is without reasonable grounds. National banks and savings institutions differ in their purpose, in the scope of their business, and in the modes of operation permitted to them. The savings institution is primarily intended to encourage saving by people of small means, and a deposit in any one bank to the amount of $2,000 is exempt to the depositor. But this exemption is only partial. The $2,000 goes to enhance the average amount of deposits on which the savings bank pays a tax to the State. A taxpayer can secure exemption from general taxation for an unlimited amount by placing it in any National bank, and the bank will pay taxes on the deposit however large. The fact that the State cannot require it to do so does not deprive the distinction of its legal effect."

The point of alleged want of valuation is discussed later; and that relating to the State's right to adopt new methods of taxation has already been noticed.

(5) *Does the act discriminate against National banks?* (Bank's brief, p. 71.)

(a) No disclosure of the names of the depositors is required to be made *by the bank.* In requiring the depositors to state the names of the banks, the general rule relating to a list and description of taxable property is followed. (See p. 38 of this brief.)

The statement at the top of p. 72 of the bank's brief is misleading. In no event does the bank have to disclose the names of the individual depositors. A catchy feature of its own advertisements was the statement that "the names of the depositors are *not* given by the bank." (Record, p. 18, art. XIV., i.) Its returns give

simply the average amount of deposits (sec. 818); and savings institutions make substantially the same kind of returns. Public Sts. of Vt.:—

SEC. 744. A domestic savings bank and savings institution doing business herein shall annually pay a tax to the State, which is hereby assessed at the rate of seven-tenths of one per cent. upon the *average amount of its deposits* and accumulations, after deducting therefrom the average amount not exceeding ten per cent. of its assets invested in United States government bonds, and the average amount of the assessed valuation of the real estate owned by such corporation, and also the amount, if any, of individual deposits in excess of two thousand dollars each, listed to the depositors in towns of this State wherein such depositors reside.

SEC. 745. A domestic trust company or savings bank and trust company doing business herein shall annually pay a tax to the State, which is hereby assessed at the rate of seven-tenths of one per cent. upon the *average amount of its deposits,* including money or securities received as trustee under order of court, or otherwise, after deducting therefrom the average amount, not exceeding ten per cent. of its assets invested in United States government bonds, and also the amount, if any, of individual deposits in excess of two thousand dollars each, listed to the depositors in towns of this State wherein such depositors reside.

SEC. 746. The taxes assessed by the two preceding sections shall be paid semi-annually, one-half in the month of February and one-half in the month of August, and shall be *based upon the returns* for the six months ending with the last day of December and June next preceding. No other tax shall be assessed on such deposits or accumulations in

savings banks, nor on such deposits in trust companies, and savings bank and trust companies, nor against the depositors on account thereof, except on individual deposits in excess of two thousand dollars in any one institution.

The bank seems unduly alarmed in regard to "publicity," in view of the fact that by U. S. Rev. Sts. 5211 its detailed reports to the comptroller of the currency—not less than five during each year—are required to be published in a local newspaper.

(b) Sec. 818, relating to the bank's return, calls for the average amount of deposits for a period ending on a certain day, and whether this is at the end of the bank's interest period or not *raises no Federal question.* Broad as it is, the Fourteenth Amendment does not guarantee uniformity in book-keeping, nor compel the State to make its fiscal periods conform to those of a National bank.

(c) No limit is fixed to the amount a depositor may have in a National bank, subject to the low tax rate. A depositor in a savings bank must pay the high local rate on the excess over $2,000 in any one such institution. Is this a discrimination *against* National banks?

(d) No *stockholder* is contesting the State's claim; and bearing in mind that the bank is now objecting only on the grounds that would enable a depositor to contest the *tax against him,* the right of a stockholder to object to the law—if he has any—is wholly outside the case.

(6) *Does the statute discriminate against the general taxpayer?* (Bank's brief, p. 73.)

Here again we suggest that as no *depositor* could urge this point, it has no bearing on the question of *considera-*

tion—which is all the relevancy the bank claims for it. The authorities on the subject of discriminations as to taxes, already cited, apply to this particular question. The opinion of the *New Hampshire Justices*, 79 Atl. 31 (cited by the bank, p. 73), turned on the state constitutional requirement of uniformity of taxation. The Vermont court, in the case at bar, has held that the act does not conflict with the Vermont Constitution in this regard (Record, p. 41, fol. 81), which holding dispenses with further inquiry here, on that point.

(B) DUE PROCESS OF LAW.

This point is argued by the bank (still speaking from the depositor's standpoint) at pp. 74-89 of its brief; and we consider its subdivisions in the order there followed.

(1) *Was there a valid assessment, or was one provided for?* (Bank's brief, pp. 75-81.)

In so far as the term "assessment" means imposing a tax on the depositors, it suffices to say that the act itself does that in section 809, in these words:

> "Every person so having a deposit in a National bank as aforesaid shall semi-annually . . . . pay a tax to the State *which is hereby assessed* at the rate of seven-twentieths of one per cent.," etc.

In Vermont, in common parlance, the assessment of a tax is regarded as being the specification of the rate and ordering it collected—though no doubt the term technically includes valuation. The town is the unit of government with us, and each town has its appraising board, known as "listers," whose functions are to appraise taxable property and make up the list whereon

taxes are to be assessed. They have nothing to do with the assessment, in the sense of levying the tax.

Speaking generally, this act of assessment is performed by the town itself, in "town meeting." Pub. Sts. of Vt.:

> SEC. 3531. A town shall express in its vote the specific sum or rate per cent. on a dollar of the grand list to be appropriated for schools in the town school district, for laying out and repairing highways, and for other necessary town expenses.

In certain cases, the selectmen or other boards assess taxes. The following extracts from Pub. Sts. of Vt. afford instances:

> SEC. 3955. For keeping in repair the highways, the town shall annually appropriate a sum not less than one-fifth of the grand list of the town, which shall be *assessed by the selectmen* and collected and paid to the town treasurer as provided by law for the payment of other town taxes, except that portion of such tax belonging to cities and incorporated villages, which is collected and appropriated by such cities and villages as provided by law.
>
> SEC. 4021. If, upon hearing all parties interested, said commissioners judge that an unorganized town or gore should contribute towards the repairing of any highway, or building or repairing any bridge, in any town in this State, by reason of their travel over such highway or bridge, they may determine the amount such unorganized town or gore shall contribute towards the same, and they may *assess a tax* not to exceed twenty per cent. on the grand list of such unorganized town or gore sufficient to pay such amount, and shall place the same in the hands of the collector of taxes for such

unorganized town or gore, who shall collect and pay the same into the treasury of the town in which such highway or bridge is located.

As to taxes assessed in the town meeting, such assessment is generally in advance of the appraisal. This meeting is held on the first Tuesday of March, annually. Pub. Sts. of Vt.:

> SEC. 3418. A meeting of the legal voters of a town shall be held annually, on the first Tuesday of March, for the election of officers and the transaction of other business; . . . .

But the individual inventories of the taxpayers which go to make up the "grand list" on which the taxes so assessed are based, are not made out until the first day of April, following (id. 543); and no appraisal is had before then (id. 546); and such list is not completed until the fifteenth day of May thereafter (id. 570). The material portions of such sections are as follows:

> SEC. 543. Every taxable person, except nonresidents taxable only for real estate, shall procure such blank and, on the first day of April, fill out the same and make full answers to all the interrogatories and take and subscribe the oath contained therein. . . . .
>
> SEC. 546. The listers shall, on the first day of April, proceed to take up such inventories and make such personal examination of the property which they are required to appraise, as will enable them to appraise it at its true value in money.
>
> SEC. 570. On or before the fifteenth day of May, the listers shall complete and deposit the

> grand list in the town clerk's office, having first appended thereto the following oath: etc.

So there is nothing novel in imposing a tax before the valuation of the property taxed has been established.

Moreover, the words—"is hereby assessed"—used in section 809 of the act, are identical with those employed in assessing other state taxes.

Thus, in assessing the tax on railroads, the language of the statute is:

> SEC. 713. For each fiscal year beginning with the first day of January, a tax *is hereby assessed* upon the property and corporate franchise of each person or corporation owning or operating a railroad located in whole or in part within this State. . . . .

Similar words are used in assessing other state taxes.

Pub. Sts. of Vt., sec. 723, 731, 734, 737, etc.

We maintain that the *fact* that this property is liable to a tax is established by the law—though, of course, no tax would actually become due and collectible unless and until the amount of it be ascertained and this is dependent on the taxable value of the property.

It is generally true that the valuation of property for purposes of taxation is established by officers or boards —in Vermont by the listers; but there need be no such official valuation when the property values itself. If the property be cash, no further fact beyond the taxpayer's statement of its amount is needful. In case of a deposit in a National bank which is a going concern, and which is paying interest on its deposits, what more

is necessary than a statement of the amount of the deposit, with accrued interest, if any? And we again refer to the *Bell's Gap case,* 134 U. S. 232, to the point that the method of assessing on nominal values is not unconstitutional.

In *Dollar Savings Bank v. United States,* 19 Wall. 227, was considered an act of Congress which imposed a tax of five per cent. on the declared dividends, undistributed earnings, and interest paid on the mortgage bonds of certain corporations, and provided for the making of certain returns by the corporation. Held, that the assessment was made by the act itself. The court said, through Mr. Justice Strong:

> "No other assessment than that made by the statute was necessary to determine the extent of the bank's liability. An assessment is only determining the value of the thing taxed, and the amount of the tax required of each individual. It may be made by the designated officers, or by the law itself."

See also

King v. United States, 99 U. S. 229.
United States v. Erie R. Co., 107 U. S. 1.
United States v. Phila. etc. R. Co., 123 U. S. 113.

And as to this method of assessing a state tax, see

Faust v. Building Ass'n, 84 Md. 186.

Nothing in the act indicates that any other value than that stated by the depositor is to be used in fixing the amount of his tax. The listers have no occasion to

pass on the question of valuation, as the amount stated by the depositor forms no part of the list for local taxation. Their duty, under section 807, is simply to report the amount, as stated by the depositors, to the Commissioner of State Taxes, and the act gives him no authority to increase or reduce it.

If, when the depositor makes his return, it is uncertain whether interest will be allowed by the bank, or if no matured interest is then due, he can truthfully state that there is no *accrued* interest—and that is the only kind of interest the inventory calls for. (Sec. 806.) "Accrued interest" means interest that has matured and is already payable.

Had the statute said *"accruing interest,"* then there would perhaps be some force to the bank's argument on pp. 80 and 81 of its brief, to the effect that the depositor cannot tell on the first day of April and October just what the amount of his credit at the bank is, as regards the item of interest.

For a discussion of the difference between accruing and accrued interest, see

Gross v. Partenheimer, 159 Pa. St. 556.

The matter of sufficient assessment—in the sense of valuation—is material here, if at all, only on the question of consideration; and as the state court said (Record, p. 35, fol. 68),

> "The only thing we are concerned with at this stage of our inquiry is whether the statute is a sufficient provision for the making of a lawful assessment."

We have seen that an assessment by the Legislature itself is sufficient; and it is of no consequence whatever that the details thereof were not actually applied because of the lack of depositors' returns. Had there been no stipulation, such returns would have been made, and thereupon the statute would have acted automatically.

(2) *Was the tax assessed without proper notice to the depositors?* (Bank's brief, pp. 81-89.)

In so far as the fact of the levy is concerned, the act itself, as one of the public laws of the State, affords all taxpayers ample notice. Repeating the court's inquiry in the *Bell's Gap case*—"What notice could they have which the law does not give them?"

As to notice of valuation, it is true that "when taxes are levied on property according to its value, *to be fixed by the listers,* in estimating the value the listers act judicially, and the taxpayers must have an opportunity to be heard."

Godfrey v. Bennington, 75 Vt. p. 355.

But, as before suggested, no other valuation than that which the depositor himself states is made the basis for this tax.

If an arbitrary assessment of a state tax, based upon the taxpayer's own returns, is invalid for the reasons urged, then the statutes taxing savings banks and corporations generally cannot stand the test. The tax in question and the means for enforcing it are clearly distinguishable from those involving an assessment, appraisal or apportionment by tax officials clothed with a measure of judicial discretion.

The bank's argument on this point is entirely without merit. The State does not distrain for these taxes. The only way it can compel a depositor to pay the tax is by means of a suit against him, under section 811, and so an opportunity for hearing before assessment is not required.

In such suit, the taxpayer would have ample opportunity to contest the validity of the tax, on all of the grounds here urged.

> *Winona, etc. Land Co. v. Minnesota*, 159 U. S. 526, 537.
> *Hagar v. Reclamation Dist.*, 111 U. S. 701, 711.
> *Kentucky Railroad Tax Cases*, 115 U. S. 321, 335.

To the point that the act does not specifically provide for the making of defences, this court in the case last cited said (p. 336):

> "In the absence of such provisions, and as principle of general jurisprudence, it is safe to say that any defence is admissible which establishes the illegality of the proceeding resulting in the alleged assessment, whether because it is in violation of the local law which is relied on as conferring the authority . . . . or because it constitutes a denial of a right secured to the party complaining by the Constitution of the United States."

This holding establishes beyond question that all of the depositor's ordinary rights as to matters of defence are secured to him; and by the statute itself (sec. 813) he is expressly given the further right to assert, by way of defence to the state's claim for the penalty he has

incurred for failure to make returns, that such failure was not wilful, and the court has discretion to remit such penalty.

We conclude this branch of the discussion by quoting from the opinion of this court, speaking through Mr. Justice Day, in *Kentucky Union Co. v. Kentucky,* 219 U. S. at p. 151:

> "This court is concerned only with the constitutionality of the law in view of the applicable provisions of the Federal Constitution. The state is left to choose its own methods of taxation and its form and manner of enforcing the payment of the public revenues, subject, so far as the Federal power is concerned, to the restricting regulations of the Constitution of the United States."

C.

The judgement of the Supreme Court of Vermont should be affirmed.

CLARKE C. FITTS,
HALE K. DARLING,
Of Counsel for Defendant in Error.

Appendix

VERMONT STATUTES.

(1894 ed.)

In force when act in question passed.

SEC. 356. The words "taxable property" when used in this title shall include taxable estate, both real and personal, including choses in action.

SEC. 374. Taxable personal estate shall be set in the list to the last owner thereof on the first day of April in each year, in the town, village, school and fire district where he resides, with the following exceptions: (All exceptions inmaterial except)

VIII. The excess of deposits over ~~fifteen~~ twenty hundred dollars in all savings banks, savings institutions and trust companies within or without this state on the first day of April in any year, shall be set in the list to the owner like other personal estate.

SEC. 399. Said blank shall, beside other interrogatories required by the preceding section, contain interrogatories for a statement of the amount of cash on hand and debts due or to become due from solvent debtors, including deposits in banks other than savings banks, savings institutions and trust companies, and checks and drafts on banks, savings institutions and trust companies; for a statement of the value of debts due or to become due from insolvent debtors; for a statement of the aggregate amount of his deposits in excess of ~~fifteen~~ twenty hundred dollars in all savings banks, savings institutions

and trust companies in this state or elsewhere; for a statement by each taxpayer claiming a deduction for debts owing, of the aggregate amount of his deposits in all savings banks, savings institutions and trust companies in this state or elsewhere; for a statement of debts owing by him on account of which he claims a deduction, with the name and residence of each person to whom such debt is owing and the amount thereof; for a statement by each taxpayer who may claim a deduction on account of debts owing, of the amount of United States government bonds owned by him, and for a statement by each taxpayer of the amount of other stocks and bonds exempt from taxation by the laws of this state owned by him.

THE ACT IN QUESTION.

PUBLIC STATUTES OF VERMONT.

SEC. 804. *Depositor's report to commissioner.* Every person having, on the first day of April and October, an interest bearing deposit in a National bank in this state, shall, except as otherwise provided by this chapter, within twenty days thereafter, report the amount thereof and the name of such bank to the commissioner of state taxes, on blanks prepared and furnished by him to such depositor on application therefor.

SEC. 805. *Depositors report to listers.* Every resident of this state so having an interest bearing deposit in a National bank in this state shall annually, except as otherwise provided in this chapter, report to the listers of the town wherein he resides, the names of all banks located in this state wherein he then has or has had any

such deposits during the year next preceding the first day of April in the year wherein such report is made, and the amount of such deposits.

SEC. 806. *Interrogatories in inventories.* The secretary of state shall incorporate into the tax inventory interrogatories so framed as to require the person subscribing to the same to state in writing and under oath whether or not he then has or has had during the year next preceding the first day of such April, any such deposits; and, if such interrogatories are answered in the affirmative, he shall also state the name of such bank and the amount of such deposit with all accrued interest.

SEC. 807. *Reports by listers.* The listers in every town shall, on or before the tenth day of May, upon blanks to be furnished by the commissioner of state taxes, report the names of all persons whose inventories show that they had in a National bank in this state on the first day of the preceding April, deposits of the character and kind described in the third preceding section, together with the amount of each individual deposit so held on such first day of April and the name of the bank holding such deposit.

SEC. 808. *Reports filed inspection.* Such reports shall be kept on file by said commissioner for three years from and after the dates on which the taxes based thereon became due and payable to the state. Such reports shall not be subject to the inspection of any person other than said commissioner and the employes in his office, the attorney general, and the state's attorney of the county wherein such bank has its principal place of business or said depositor, if a resident of this state, has his domicile. Any information contained in such

reports shall not be disclosed by any person authorized to examine the same, except by the direction of a court of competent jurisdiction.

SEC. 809. *Assessment of tax; payment.* Every person so having a deposit in a National bank as aforesaid shall semi-annually, except as otherwise provided by this chapter, pay a tax to the state, which is hereby assessed at the rate of seven-twentieths of one per cent. semi-annually upon the amount of such deposit so held by such National bank on the first day of April and October; and no deduction therefrom shall be made on account of any exemption. The taxes imposed by this section shall be paid to the state treasurer semi-annually on or before the last day of May and November next following the dates whereon the reports provided for in the fourth preceding section are required to be made.

SEC. 810. *Exempt from other taxes.* No other tax shall be assessed on such deposits in National banks, nor against the depositors on account thereof.

SEC. 811. *Penalty.* A depositor who wilfully fails to make returns or pay the taxes provided by this chapter shall forfeit ten per cent. of such deposit to the use of the state for each month's delay in filing such return. Such tax and forfeiture may be recovered in an action on this statute commenced by the commissioner of state taxes in the name of the state, in any county, municipal or city court.

SEC. 812. *Trustee process.* A person having any of the moneys, goods, chattels, effects, rights or credits of said depositor in his possession may be summoned as trustee in any action instituted under the preceding section, notwithstanding that the amount of such tax or

the amount in his hands may be less than ten dollars.

SEC. 813. *Waiver of penalty.* If the commissioner of state taxes or the court wherein such action is pending for the recovery of such tax or forfeiture becomes satisfied that such failure was not wilful on the part of the depositor, said commissioner or said court may, in its discretion, waive any part or all of such penalty.

SEC. 814. *Bank may elect to pay.* If a national bank in this state so elects it may pay to the state all taxes provided by this chapter; and it shall be lawful for such bank to deduct such taxes so paid from the interest or deposits then or thereafter held by it belonging to the person from whom such tax became due.

SEC. 815. *Same; stipulation.* If a national bank elects to so pay such taxes to the state and to make returns as hereinafter provided, it shall semi-annually, on or before the first day of April and October, file with the commissioner of state taxes a stipulation setting forth such fact; and thereupon such bank shall become *liable to the state for such tax* for the six months named in such stipulation and to make returns as hereinafter provided; and no depositor in such bank shall be required to make the returns hereinbefore specified covering the six months' period for which such stipulation was filed.

SEC. 816. *Commissioner's certificate to bank.* Upon such stipulation being filed, said commissioner shall issue in duplicate to such bank a certificate showing that it has filed such stipulation.

SEC. 817. *Bank's liability.* Every bank filing such stipulation shall thereupon become liable to the state for the amount of *such tax of seven-twentieths of one per cent. of the average amount of such deposits* held

by such bank during the six months beginning with the first day of April and October respectively, for which such stipulation was filed.

SEC. 818. *Bank's return.* If such bank, on or before the first day of April, files a stipulation as hereinbefore provided, it shall, on or before the thirty-first day of the following October, file a return with the state treasurer and commissioner of state taxes, verified by the oath of its president, cashier, or one of its directors, showing the average amount of such deposits for the six months ending the thirtieth day of September in that year, and shall pay to the state treasurer the amount of such semi-annual tax. In case such bank, on or before the first day of October, files a like stipulation, it shall, on or before the *thirtieth* day of the following April, file a like return with the first named officers, showing the average amount of such deposits for the six months ending with the thirty-first day of March next preceding the making of such return, and shall, in like manner, pay such taxes.

SEC. 819. *Exemptions.* The provisions of this chapter shall not apply to municipalities; nor to corporations organized solely for charitable, educational or religious purposes; nor to railroad, insurance, guaranty, express, telegraph, telephone, steamboat, car, transportation, sleeping car, parlor car, mortgage, loan or investment companies; nor to savings banks, trust companies, and savings bank and trust companies which have interest bearing deposits in national banks; nor to national banks having an interest bearing deposit in another national bank; nor to any person having any sum of money on deposit in a national bank whereon interest

not exceeding the rate of two per cent. per annum is paid or allowed him by such national bank.

SEC. 820. *Exemptions restricted.* Nothing in this chapter shall be construed as exempting from taxation any deposit in any national bank, except as hereinbefore provided.

OTHER STATUTES CITED PUBLIC STATUTES OF VERMONT.

SEC. 536. *Blanks.* The secretary of state shall annually, on or before the first day of March, furnish at the expense of the state, to the several town clerks blank inventories sufficient in number to meet the requirements of this chapter, and in the most convenient form, with suitable interrogatories, to contain, when filled, a full statement of all taxable property, real and personal, of each taxpayer in such town. Such blanks shall be so formulated by the secretary of state as to require under oath, from each person, such full information as to each class and item of his taxable property, real and personal, as will enable the listers, after a personal examination of such property, to appraise it at its true value in money.

SEC. 543. *Taxpayer's duties.* Every taxable person, except non-residents taxable only for real estate, shall procure such blank and, on the first day of April, fill out the same and make full answers to all the interrogatories and take and subscribe the oath contained therein and, if a resident, deliver such inventory to a lister on personal demand or within three days after written notice therefor left by a lister at the last and usual place of abode of such taxpayer; and, if a non-

resident, he shall forward such inventory to a lister on or before the twentieth day of April. The listers and all persons by law authorized to administer oaths may administer the oath contained in the inventory and shall administer it with the same formality as to a witness in court.

SEC. 561. *Doubling; extra assessment.* If a person wilfully omits to make, swear to and deliver an inventory or to answer any interrogatory therein required by this chapter or makes a false answer or statement therein, or if the listers have sufficient reason to believe that an inventory does not contain a full, true and correct statement of the taxable property of the person filling out the same, said listers shall ascertain as best they can the amount of the taxable property of such person, appraise the same at its value in money and double the amount so obtained. If the amount obtained by doubling is, in the opinion of the listers, less than the amount of the taxable property of such person, they shall further assess such person a sum which will, in their judgment, make up such amount. If no taxable property of such person is ascertainable by the listers, they shall either assess such person a sum which, in their judgment, is the true value of all the taxable property owned by him, or double the amount of his poll list. One per cent. of the amount obtained by doubling and of the extra assessment, if any, or of the assessment, shall, with the amount of the taxable poll, if any, doubled or otherwise, constitute the grand list of such person.

SEC. 581. *Who may examine; production in court.* The town clerk shall allow the listers, selectmen, town grand jurors or attorney of such town, or the state's

attorney of the county, to examine any inventory they may name, and shall also permit each taxpayer to examine his own, and shall not allow any other person to inspect such inventories, except as otherwise provided. Inventories lodged with the town clerk shall be produced in court by said clerk upon subpoena for that purpose. The town clerk shall also allow a commission authorized so to do by the general assembly, a member of such commission or a person designated in writing by such commission, to examine any inventory on file in his office and make such abstracts thereof as shall be deemed necessary to carry out the purposes of such authorization. The information obtained by such examination or contained in such abstract shall not be disclosed in such manner as will reveal the name or identity of the person making such inventory, except for the use of such commission. The contents of such inventories shall not be disclosed by any person having access to the same, except as provided in this chapter.

SEC. 583. *False swearing; perjury.* A person who wilfully swears falsely in violation of any of the provisions of this chapter shall be guilty of perjury and punished accordingly.

SEC. 705. *Report of earnings, etc.* A person or corporation owning or operating a railroad located in whole or in part in this state shall annually, on or before the fifteenth day of September, file with said commissioner upon blanks to be prepared and furnished at the expense of the state, a report for the year ending with the thirtieth day of June next preceding; and such report shall show, among other things, the amount of gross and net earnings of such person or corporation;

and, if any portion of such railroad is without this state, such returns shall give the amount of gross and net earnings per mile of such road, the length of the entire main line of road and the number of miles thereof in this state, the kind and weight of rail used on its main line, the kind and number of ties per mile, the kind of ballast, the number of miles of side and spur tracks, a list of its equipment, the amount and value of its capital stock, its funded and floating debt, its surplus, its bonds secured by mortgage or other securities on the property of such person or corporation, the market value of its stock and bonds, and the amount of dividends, interest or indebtedness paid annually or semi-annually. If a railroad is leased and operated by the lessee, such returns shall also give the amount paid for rental thereof, and any other matter required by said commissioner to carry out the provisions of this chapter. Such person or corporation shall also, whenever required in writing by said commissioner, render a sworn statement of such other and further facts relating to its financial or physical condition, as shall be required by him in making the appraisal hereinafter mentioned.

SEC. 706. *Commissioner to appraise.* Said commissioner shall appraise at its fair and just value all property acquired, constructed or used for railroad business or purposes, including the corporate franchise, belonging to any person or corporation owning or operating a railroad located entirely within this state. Such appraisal shall be taken to be the true value of such railroad, its rights, corporate franchise and property in this state, for the purpose of taxation.

SEC. 707. *Road extending outside state.* If a line

of railroad extends beyond the limits of this state, its whole valuation ascertained as aforesaid shall be divided by the number of miles of its entire main line; and the amount thus obtained shall be taken to be the value of such railroad per mile. Such sum shall be multiplied by the number of miles in this state; and the product thus obtained shall be taken to be the true value of such railroad, its rights, corporate franchise and property within this state, for the purpose of taxation; provided that if less than one mile of the main line of a railroad is within this state, said commissioner may appraise such portion lying within this state at its fair and just value without appraising that part lying without the state.

SEC. 708. *Appraisal biennially.* Such appraisal shall, except as otherwise provided in this chapter, be made biennially, on or before the thirty-first day of December. If trains other than construction trains commence running on a railroad located in whole or in part in this state, or over any extension or branch thereof, subsequent to the date on which such biennial appraisal is made, said commissioner shall appraise such railroad in the manner hereinbefore provided, on or before the thirty-first day of December in the year in which such trains commence running.

SEC. 709. *Record.* Said commissioner shall, on or before the fifteenth day of January following such appraisal, make a record thereof in a book kept in his office for that purpose, and shall, on or before the last named date, furnish the state treasurer with a copy of each appraisal made in pursuance of this chapter.

SEC. 710. *Notice.* Said commissioner shall, on or

before the fifteenth day of January following such appraisal, notify by mail every person or corporation owning or operating a railroad located in whole or in part within this state, of the amount of the appraisal and the amount of taxes annually assessed thereon against the railroad so owned or operated by such person or corporation. A failure on the part of said commissioner to give such notice, or of the person or corporation to receive the same, shall not invalidate such appraisal. An appraisal of any such railroad property within this state, made pursuant to the provisions of this chapter, shall remain in full force and effect until a subsequent appraisal has been lawfully made and established.

SEC. 711. *Appeals.* A party aggrieved, including the state represented by the state treasurer, may, on or before the fifteenth day of February following every such appraisal, appeal to a board consisting of the lieutenant-governor, secretary of state and auditor of accounts, who shall be sworn and shall hear such appeal. Said board shall appraise, at its fair and just value, all property acquired, constructed or used for railroad business or purposes, including the corporate franchise belonging to the person or corporation, from the appraisal of which an appeal has been taken. Such appraisal shall be made pursuant to the provisions of this chapter and shall stand in lieu of the appraisal made by the commissioner of state taxes. Said board shall, upon establishing its appraisal, notify the state treasurer and said commissioner in writing of the amount thereof; and a record thereof shall be made by said commissioner in the book wherein appraisals of

railroad property are recorded. Notice in writing shall likewise be given to the person or corporation owning or operating the railroad thus appraised.

SEC. 712. *Same.* Said board shall establish such rules and regulations relative to the time and method of hearing and determining such appeals, as it shall deem just; provided that such appeals shall be finally determined and the appraisal by said board made and established on or before the first day of April following such appeals. The cost of such appeals shall be paid as said board shall determine. The decision of said board upon appeals as aforesaid, and the appraisal established by it, shall be final. The state treasurer and the attorney general shall represent the state in all such legal proceedings, unless the attorney general is disqualified to act therein. In case of such disqualification, the state shall be represented by the state treasurer and by such counsel as he may select, with the approval of the governor, to be paid upon an order drawn by the auditor of accounts.

SEC. 713. *Tax on appraisal.* For each fiscal year beginning with the first day of January, a tax is hereby assessed upon the property and corporate franchise of each person or corporation owning or operating a railroad located in whole or in part within this state, at the rate of one per cent. of the appraised value thereof obtained and established as hereinbefore provided. One-half of the tax imposed by this section, covering the six months ending with the thirtieth day of June in each year, shall be paid to the state treasurer on or before the fifteenth day of the following October, by the person or corporation then owning or operating such railroad; and

the remaining half of such tax, covering the six months ending with the thirty-first day of December in each year, shall be paid to the state treasurer on or before the fifteenth day of the following April, by the person or corporation then owning or operating such railroad.

SEC. 714. *Tax on gross earnings.* For each fiscal year beginning with the first day of January, a corporation or person owning or operating a railroad located in whole or in part within this state may, in lieu of the tax assessed in the preceding section, pay to the state in the manner and at the time specified in the third following section, two and one-half per cent. of such part of the entire gross earnings derived from all sources as does not exceed two thousand dollars per mile of the roadbed of such railroad located within this state; at the rate of two and three-fourths per cent. of such part of such gross earnings as exceeds two thousand dollars and does not exceed two thousand five hundred dollars per mile as aforesaid; at the rate of three per cent. of such part of such gross earnings as exceeds two thousand five hundred dollars and does not exceed three thousand dollars per mile as aforesaid; at the rate of three and one-fourth per cent. of such part of such gross earnings as exceeds three thousand dollars and does not exceed three thousand five hundred dollars per mile as aforesaid; at the rate of three and one-half per cent. of such part of such gross earnings as exceeds three thousand five hundred dollars and does not exceed four thousand dollars per mile as aforesaid; at the rate of three and three-fourths per cent. of such part of such gross earnings as exceeds four thousand dollars and does not exceed four thousand five hundred dollars per mile as aforesaid; and four per

cent. of such part of such gross earnings as exceeds four thousand five hundred dollars per mile as aforesaid. If the gross earnings of a railroad located in whole or in part within this state do not exceed two thousand dollars per mile in this state, such railroad may, in lieu of the taxes assessed in the preceding section, pay two and one-half per cent. of the entire gross earnings of such railroad, to be ascertained as aforesaid. If the corporation or person required in the preceding section to pay the tax therein imposed, does not accept the option of paying such per cent. of the gross earnings for the six months ending with the thirtieth day of June in any year, determined as herein provided, such corporation or person shall not have the right to accept the option of paying such per cent. of such gross earnings, determined as aforesaid, for the six months ending with the thirty-first day of December next following.

SEC. 715. *Apportionment.* If a railroad is located partly within and partly without this state, the gross earnings of that part of such railroad located within this state during any given period shall be deemed to be that part of the entire gross earnings of such railroad both within and without this state, derived from all sources, which the total mileage within this state of all revenue earning trains operated on such railroad during such period bears to the total mileage both within and without this state of all revenue earning trains operated during such period upon the entire line of such railroad both within and without this state.

SEC. 716. *Deduction for car rentals.* In computing its gross earnings on account of car rentals, a railroad shall be allowed to deduct from the gross amount

of such rentals actually received by it during each semi-annual period, the total amount of such rentals actually paid by it during such period.

SEC. 717. *Return of gross earnings; payment.* A corporation or person accepting the provisions of the third preceding section shall make returns of the gross earnings of such railroad for the semi-annual periods ending with the last day of June and December respectively as hereinbefore provided for making semi-annual returns, and shall, within thirty days thereafter, pay to the state treasurer the percentage of such gross earnings provided in the third preceding section.

SEC. 718. *Lessees.* When a railroad is operated in this state by a person or corporation, under a lease or other contract, such taxes or payments on gross receipts shall be paid by the lessee of such railroad or holder of such contract and be charged against and deducted from any payment due or to become due under such lease or contract, unless it is otherwise expressly stipulated therein. The person or corporation ultimately paying such tax shall be construed to be the party who may accept the provisions of the fourth preceding section.

SEC. 719. *Refund.* For the term of five years from and after the date whereon cars for public traffic or accommodation commenced running on an electric railroad built after February first, nineteen hundred and seven, a sum equal to ninety per cent. of the tax based upon the appraisal thereof for the purpose of taxation, or upon the gross earnings thereof paid in lieu of such first named tax, is hereby annually appropriated in aid of the company owning or operating such railroad and paying such tax.

SEC. 720. *Auditor's order.* Upon presentation of a certificate signed by the commissioner of state taxes setting forth the amount of such tax paid during the fiscal year ending with the first day of May in each year by such company, the auditor of accounts shall annually, on or before the first day of June, draw an order in favor of such company for the appropriation mentioned in the preceding section.

SEC. 721. *Returns of domestic corporations.* A domestic steamboat, car or transportation company shall annually, on or before the fifteenth day of September, make returns to the commissioner of state taxes of the amount of the entire gross and net earnings of such corporation for the year ending with the thirtieth day of June next preceding. Such returns shall show the description and value of all its real and personal estate, its equipment, the amount and value of its capital stock, its funded and floating debts, its bonds secured by mortgage or other security on the property of such corporation, and the market value of all its stock and bonds, and the amount of dividends, interest or indebtedness paid annually or semi-annually, also all stock, bonds, securities and surplus held by such company.

SEC. 722. *Appraisal.* Said commissioner shall biennially on or before the thirty-first day of December, appraise the rights, property and corporate franchise of such company at its fair and just value. Such appraisal shall be taken to be the true value of such rights, property and corporate franchise in this state for the purpose of taxation. The provisions of this chapter relating to the appraisal of the rights, property and corporate franchise of railroads, so far as applicable to the companies

mentioned in this section, to the right of appeal, and to the method of procedure therewith connected, shall apply to all persons or corporations mentioned in this and the preceding section.

SEC. 723. *Assessment.* A tax of one per cent. is hereby annually assessed upon such appraisal, and shall be paid to the state treasurer as provided for the payment of taxes by persons or corporations owning or operating a railroad.

SEC. 724. *Option.* A corporation specified in the second preceding section may pay to the state, in lieu of the tax imposed by the preceding section, two and one-half per cent. of the entire gross earnings thereof for each semi-annual period ending with the last day of June and December respectively, in the same manner, at the same time and under the same restrictions as provided for the payment of taxes by persons or corporations owning or operating a railroad in this state, and shall also make and file semi-annual returns at the times and in the manner hereinbefore provided.

SEC. 725. *Steamboat taxes, payment.* A person residing within this state who owns or operates a steamboat used in the transportation of passengers or freight for hire, and all foreign corporations that lease, operate or control a steamboat so used, belonging to another corporation or person, or that owns such steamboat, shall pay to the state the tax prescribed in the second preceding section, unless electing to pay the tax prescribed in the preceding section. The provisions of the third preceding section shall apply to the appraisal of such steamboat and to the right of appeal therefrom.

SEC. 726. *Franchise tax.* A corporation owning or

operating sleeping, parlor, dining or other similar cars within this state, whether such cars are run on railroads located wholly or in part in this state, and for service or accommodation in which compensation is charged by the corporation owning or operating such cars, shall annually, on or before the fifteenth day of October, pay to the state for the fiscal year ending with the thirtieth day of June next preceding, a franchise tax, the amount of which shall be the equivalent of seven-tenths of one per cent. of the capital invested or used by such corporation in this state; which, for the purposes of this chapter, shall be deemed to be that proportion of the entire capital of such corporation invested or used in the operation of sleeping, parlor, dining or other similar cars, which the number of miles of all railroads within this state on which such cars have been operated by such corporation during such year bears to the total number of miles of all railroads within and without this state on which such cars have been operated by such corporation during such year.

SEC. 727. *Returns.* Every such corporation shall annually on or before the first day of August, file a return upon blanks to be furnished by the commissioner of state taxes, giving the number of shares of capital stock so invested or used; the par value of such shares; the amount of surplus, undivided profits or deferred dividends in script or otherwise that have been set aside on account of such capital stock; the number of miles of railroad located within and without this state over which such cars have been operated by such corporation during such year; the number of miles of railroad within this state over which such cars have been so

operated by such corporation during such year; and any other material facts which said commissioner shall deem necessary in order to determine the amount of the tax imposed by the preceding section.

SEC. 728. *Valuation.* The fair value of the capital of such corporation invested or used in this state, determined as aforesaid, shall be established by said commissioner on or before the fifteenth day of August. He shall indorse on such return the valuation so established by him, and shall also, on or before such date, mail a notice to such corporation, stating the amount of such valuation and the amount of tax due under the provisions of the second preceding section.

SEC. 729. *Appeal.* In case such corporation shall be dissatisfied with such valuation, it may, on or before the fifteenth day of September succeeding such valuation, appeal to the board designated in section seven hundred and eleven. Such appeal shall be heard and determined on or before the tenth day of October succeeding such appeal, in the manner and subject to the provisions of sections seven hundred and eleven and seven hundred and twelve, in so far as they are applicable thereto, provided that the notice of the value of the capital fixed by said board need not be recorded as therein provided.

SEC. 730. *Exemption.* A railroad corporation owning or operating a railroad located in whole or in part in this state and operating its own sleeping, parlor, dining or other similar cars and paying the tax provided in section seven hundred and thirteen or section seven hundred and fourteen, shall not be required to pay the

franchise tax or to make the returns provided by the third and fourth preceding sections, respectively.

SEC. 731. *Assessment.* A corporation, association, joint stock company or person transporting express matter for hire from a point in this state to another point herein shall annually, on or before the fifteenth day of October, pay a tax to the state for the fiscal year ending on the thirtieth day of June next preceding, which is hereby assessed at the rate of eight dollars for every mile of the routes or lines located wholly within this state upon or over which such corporation, association, joint stock company or person transports, during such fiscal year, express matter for hire between a point in this state and another point herein.

SEC. 732. *Bond filed.* Every corporation, association or joint stock company organized for or doing a general express business, and which shall be liable to pay an annual license tax to the state under the provisions of section seven hundred and fifty-two shall, at the time it pays such annual license tax, furnish and deliver to the state treasurer a bond to the state for such sum and with such sureties as the state treasurer may require, conditioned that it will, for the year then next ensuing, pay all taxes assessed against it under the laws of the state, according to the provisions of law.

SEC. 733. *Penalty for neglect.* A corporation, association or joint stock company that neglects or refuses to furnish such bond as required by the preceding section, shall not be permitted to further exercise its corporate functions or do business in the state, and shall be subject in all things to the same penalties and

conditions, as though it had neglected and refused to pay its annual license tax as the law provides.

SEC. 734. *Assessment.* A person or corporation owning or operating a telegraph line within this state shall pay an annual tax to the state upon the property and corporate franchise of such person or corporation, which is hereby assessed at the rate of sixty cents per mile of poles and one line of wire, and forty cents per mile for each additional wire, owned, maintained or operated within this state, during the year ending with the thirtieth day of June.

SEC. 735. *Option.* Such person or corporation may annually, in lieu of the tax assessed in the preceding section, pay to the state a sum equal to three per cent. of the entire gross earnings of such person or corporation collected within the state on account of telegraphic messages or communications sent or received herein.

SEC. 736. *Election.* Such person or corporation shall, as a part of the returns required by this chapter, indicate whether such person or corporation will pay under the provisions of the first or second preceding section, and shall give a full and detailed statement of all lines of poles with one wire and of each additional wire owned, maintained or operated within this state.

SEC. 737. *Assessment.* A person or corporation owning or operating a telephone line within this state shall pay an annual tax to the state, which is hereby assessed at the rate of forty cents each upon the average number of telephonic transmitters in use within this state and maintained or operated by such person or corporation during the year ending with the thirty-first day of December; and at the rate of thirty cents per mile

upon the average mileage of all telephone wires in use, owned, maintained or operated by such person or corporation within this state during the year ending with the thirty-first day of December.

SEC. 738. *Option.* Such person or corporation may annually, in lieu of the tax assessed in the preceding section, pay to the state a sum equal to three per cent. of the entire gross earnings of such person or corporation collected within the state on account of telephonic messages or communications sent or received, including all sums received for tolls and for rental of lines, instruments or other appliances, and from any division or apportionment of tolls or rentals collected within this state during the year ending with the thirty-first day of December.

SEC. 739. *Returns.* Such person or corporation shall annually make returns in the manner provided in section six hundred and ninety-eight, on or before the fifteenth day of March, and shall therein indicate whether such person or corporation will pay under the provisions of the first or second preceding section. Such returns shall also show the number of telephonic transmitters in use by the person or corporation making the returns, on the first day of each of the twelve calendar months terminating with the thirty-first day of December in each year, and the average thereof, also a full and detailed statement showing the mileage of all lines of wires in use, whether in cables or otherwise, owned, maintained or operated within this state by such person or corporation on the last day of June and December respectively during such year, and the average mileage thereof.

SEC. 740. *Assessment.* A domestic or foreign insurance company, association or society, or a surety or guaranty company, doing business in this state, shall pay a tax to the state, which is hereby assessed at the rate of two per cent. per annum on the gross amount of premiums and assessments collected on its business in this state, including premiums received for re-insurance. Such tax shall be paid annually in the month of February, and shall be based upon the business of such company, association or society during the year terminating with the thirty-first day of December preceding. Such company, association or society shall annually, on or before the last day of February, make returns in the manner provided in section six hundred and ninety-eight.

SEC. 741. *Deduction.* In determining the amount of taxes to be assessed under the provisions of the preceding section, there shall be deducted from the full amount of such premiums and assessments all sums paid for return premiums on cancelled policies upon risks located herein; dividends actually paid to policy holders residing herein; and all sums actually paid to other companies incorporated under the laws of this state or to a foreign company licensed to do business herein, for re-insurance on risks within this state for which the full premium has been collected by the company claiming such deduction. Nothing in this section shall be construed to allow dividends in script, or otherwise, in stock, mutual or mixed companies, or surrender values for life policies, to be considered return premiums.

SEC. 742. *Domestic life companies.* A domestic life insurance company shall, in addition to the tax assessed

by the second preceding section, pay a tax to the state, which is hereby assessed at the rate of one per cent. on the total admitted assets of such company after deducting therefrom the necessary reserve on all existing policies, computed according to the laws of this state and certified to the commissioner of state taxes by the insurance commissioners; the reserve actually set apart by such company to fulfill the terms of any policy or contract of insurance providing for an annuity, life rate endowment, or trust fund; the value of all its real estate situated in this state or elsewhere upon which such company pays taxes to the town, city or county wherein it is located; all unadjusted death claims, matured endowments, non-forfeited cash surrender values, dividends, and annuity payments, accrued but not paid; premiums paid in advance; taxes assessed upon real estate, but not paid; taxes on premiums accrued, but not paid; and all other accrued liabilities, including current expenses.

SEC. 743. *Reciprocal provisions.* If another state or country imposes upon or requires of a domestic insurance, surety or guaranty company, or its agents doing business therein, taxes exceeding those imposed by this state upon or required of foreign insurance, surety or guaranty companies doing business herein, an insurance, surety or guaranty company organized under the laws of such other state or country, and its agents doing business in this state, shall be subject to taxes similar to those so imposed in such other state or country; and the same shall be imposed, required and enforced as like taxes are under the laws of this state.

SEC. 744. *Savings banks.* A domestic savings bank and savings institution doing business herein shall

annually pay a tax to the state, which is hereby assessed at the rate of seven-tenths of one per cent. upon the average amount of its deposits and accumulations, after deducting therefrom the average amount not exceeding ten per cent. of its assets invested in United States government bonds, and the average amount of the assessed valuation of the real estate owned by such corporation, and also the amount, if any, of individual deposits in excess of two thousand dollars each, listed to the depositors in towns of this state wherein such depositors reside.

SEC. 745. *Trust companies, etc.* A domestic trust company or savings bank and trust company doing business herein shall annually pay a tax to the state, which is hereby assessed at the rate of seven-tenths of one per cent. upon the average amount of its deposits, including money or securities received as trustee under order of court, or otherwise, after deducting therefrom the average amount, not exceeding ten per cent., of its assets invested in United States government bonds, and also the amount, if any, of individual deposits in excess of two thousand dollars each, listed to the depositors in towns of this state wherein such depositors reside.

SEC. 746. *Taxes, payable when.* The taxes assessed by the two preceding sections shall be paid semi-annually, one-half in the month of February and one-half in the month of August and shall be based upon the returns for the six months ending with the last day of December and June next preceding. No other tax shall be assessed on such deposits or accumulations in savings banks, nor on such deposits in trust companies, and savings bank and trust companies, nor against the

depositors on account thereof, except on individual deposits in excess of two thousand dollars, in any one institution.

SEC. 747. *Definition.* The term "investment company," as used in this chapter, shall include all domestic or foreign associations, companies or corporations organized for the purpose of negotiating or placing loans secured upon property without this state, or that may be engaged in selling choses in action, or bonds secured by mortgages on property, or by pledges of such mortgages, and which are executed by individuals or issued by municipal or other corporations without this state.

SEC. 748. *Returns.* A person, investment company or corporation obtaining money from residents or corporations in this state, to be loaned without this state, or doing business in this state by selling debenture bonds, mortgages upon real or personal estate, choses in action, or securities of any kind upon property without this state, not including bills of exchange having less than twelve months to run, shall annually, in the month of July, make returns to the commissioner of state taxes of the amount of money so received, and the amount of bonds, choses in action or securities of any kind as aforesaid, sold to parties or corporations within this state. Such returns shall be for the period of one year preceding the thirtieth day of June annually.

SEC. 749. *Assessment.* A tax of one per cent. upon the aggregate amount of all moneys so received to be loaned without the state, and upon the aggregate amount of bonds, mortgages, choses in action and securities of any kind negotiated as aforesaid, is hereby

assessed against the person, investment company or corporation receiving such money or transacting such business. Such tax shall be paid to the state treasurer within thirty days from the time of making such returns and shall be in lieu of all other taxes thereon for the period of one year only.

SEC. 750. *Option.* A person, agent, investment company or corporation may omit payment of the tax provided in the preceding section by giving the name and post-office address of the person or corporation from whom such money has been received, or to whom such bonds, mortgages, choses in action or securities were sold, and the amount received from each such person or corporation, and informing the commissioner of state taxes that the taxes are to be paid by the purchaser. When advantage is taken of this provision, said commissioner shall assess thereon a tax of one per cent. against the person or corporation of whom such agent, person, investment company or corporation received such money, or to whom such bonds, mortgages, choses in action or other securities were sold. The payment of such tax shall exempt such agent, person, investment company or corporation from all other taxes thereon, for the period of one year only. Said commissioner shall notify such person by mail, of the tax so assessed, immediately after such assessment is made; and the same shall be paid to the state treasurer within thirty days from the time such notice is issued. If the purchaser puts such securities or investments into his personal list for taxation and is assessed and pays taxes thereon for the full amount in the town where such purchaser or investor resides, said commissioner may, with

the concurrence of the state treasurer, remit payment of such tax.

SEC. 751. *Penalty.* A person, agent, investment company or corporation refusing or neglecting to comply with the three preceding sections shall be fined not more than five thousand dollars nor less than five hundred dollars. If a foreign investment company or corporation so neglects or refuses, the state shall have a lien on its bonds filed with the bank commissioner according to law, for any fine which may be imposed upon it. The provisions of this and the four preceding sections shall not apply to corporations organized in this state that pay taxes on their capital stock, premiums or deposits, except where the sales of such securities exceed their premiums, deposits or capital stock, but shall apply to such excess.

SEC. 3531. *Taxes to be voted specifically.* A town shall express in its vote the specific sum or rate per cent. on a dollar of the grand list to be appropriated for schools in the town school district, for laying out and repairing highways, and for other necessary town expenses.

SEC. 4663. *Rate of interest and dividends.* The trustees of a savings bank or savings institution shall regulate the rate of interest or dividends, not to exceed one and three-fourths per cent. semi-annually upon the deposits therewith, in such manner that depositors shall receive, as nearly as may be, the profits of such corporation, after deducting necessary expenses, and reserving such amounts as the trustees deem expedient as a surplus fund for the security of depositors, which, to the amount of ten per cent. of its deposits, the trustees of such cor-

poration may gradually accumulate and hold to meet any contingency or loss in its business from the depreciation of its securities or otherwise; but the trustees may classify the depositors according to the character, amount and duration of their dealings with the corporation, and regulate the interest or dividends allowed, so that each depositor shall receive the same ratable proportion of interest or dividends as others of his class.

Office Supreme Court, U. S.
FILED.
APR 25 1913
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. ~~266~~. 29

THE CLEMENT NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

THE STATE OF VERMONT, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF VERMONT.

SUGGESTIONS IN REPLY TO DEFENDANT IN ERROR'S BRIEF.

MAXWELL EVARTS,
MARVELLE C. WEBBER,
Counsel for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 266.

THE CLEMENT NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

THE STATE OF VERMONT, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF VERMONT.

SUGGESTIONS IN REPLY TO DEFENDANT IN ERROR'S BRIEF.

1. *Nature of the Action.*

The reason given in the opinion of the Supreme Court of Vermont why those upon whom the tax was imposed have been omitted from the tax list and the statement that the substitution of the bank for the depositor as the one responsible for the payment of the tax are statements of *opinion* by the court, *not of facts found by the court.* The only *facts found* in the case are those contained in the *agreed statement of facts.*

Therefore, the cases cited in 218 U. S. on brief page 4 are not authority for the proposition that the extract from the

opinion of the Vermont court will be treated as binding, so far as it relates to matters of fact.

(Notice inconsistent statements of Vermont court: (*a*) in above extract referred to page 4, State's brief, the court says suit is on bank's *agreement to pay taxes of depositors* (which is what we claim), while at folio 90, page 45, Record, State says (*b*) it is *not the tax itself,* but *an amount in lieu of the taxes!*)

2. *Construction of the Statute.*

The cases cited do not uphold the doctrine that the decision of the State court is final upon any Federal question—in fact they are authority for the proposition that the construction of a *statute* or a *contract* by a State court is not binding where a Federal question is involved.

Rankin *vs.* Emigh, 218 U. S., 27, 34.
Lewis *vs.* Monson, 151 U. S., 545.

In the latter case this court expressly says it does not follow the construction of the State court "where it is claimed that some right protected by the Federal Constitution has been invaded."

A case cited in State's brief on another point, on page 19, is authority for our contention. There one question involved was whether this court had jurisdiction where a national bank had set up *ultra vires* to make a certain contract, as a defense to a suit to recover on the agreement, and the State court had held that the contract was not *ultra vires*, and this court said it was not bound by the construction of the State court, as the matter was not one of general law, but involved a Federal statute. Logan Bank *vs.* Townsend 139 U. S. 67.

The discussion and authorities cited on pages 5 to 11 are all preliminary to making the statement that the following

propositions have been finally settled by the Vermont court, viz:

1. That the statute assesses no tax upon the property or business of a national bank.

2. That all legal requirements for assessing the depositors are met. (page 11.)

But this discussion and these propositions fail, because *they do present Federal questions.*

As to Proposition No. 1.

This court must be the final authority as to whether a State tax is one on a national bank, and whether a State statute does in effect tax a national bank. This is essential to the preservation of a Federal instrumentality. If this court should be convinced that a statute did in effect tax a national bank, is it possible to conceive that it would feel itself bound by an erroneous, or in a possible case an iniquitous construction put upon a statute by a State court, and thus leave the bank to be encroached upon and interfered with by State taxing authorities?

As to Proposition No. 2.

This involves a Federal question, and it relates to the due process of law clause of the fourteenth amendment. The matter of assessment is one of essential consideration in a question of due process of law in taxation cases.

3. *Ultra Vires.*

The State's counsel are afraid of the word "tax" in the statute and stipulation. They say it has "no special significance." An easy way to dispose of it, but very little

reason. The reference to the statement of the Vermont court that the use of the word "tax" cannot be given an effect adverse to State's claim is not fortunate, for that court in giving its reason for that statement relies upon only a part of what the agreement or stipulation says, and ignores that part wherein the bank is made expressly to pay a *tax*.

(Defendant's Brief, p. 12.)

The argument contained in the inquiry on page 13, that since a national bank has power to receive deposits and make contracts, must it not have power to make a contract that tends to increase its deposits, is fallacious.

Assuming that in this case the contract did tend to increase its deposits, that would not make it lawful for the bank to place itself under the supervision of the State tax authorities and make the tax returns and pay the taxes of its depositors or a tax on its business.

Perhaps an agreement on the part of the national banks to pay a tax on its business, if the State would waive taxing its depositors, might increase its deposits, but such agreement would still be *ultra vires*. The effect upon its business as to being profitable or unprofitable does not determine the question of *power;* that is determined by the express and implied powers of the Banking Act.

The question is, Is this contract (1) within the express powers of national banks; or (2) such an incidental power as is necessary to carry on the business of banking, that is, properly incidental to its enumerated powers?

None of the cases cited by defendant bring it within such powers.

The two cases in Federal Reporter, Schofield *vs.* Bank, 97 Fed., 282, and George *vs.* Wallace, 135 Fed., 286, are not authority for what is claimed. They do not hold as an independent transaction that a bank can assume another's obligations. They do hold that *when a bank enters into a contract which it has power to make*, the fact that part of the consideration for that contract for what it receives out of

the contract is the assumption of indebtedness does not render the contract *ultra vires*. (pp. 20-21.)

Nor is the Iowa case authority for the bare proposition that a national bank can agree to pay the taxes of an individual. We assume that the contract to buy its stock was not *ultra vires;* the agreement to pay the taxes on the stock was only part of the consideration for a contract it had power to make. And that contract was made with the individual owning the stock. (p. 21.)

But in the case at bar the contract itself is to place the national bank under the supervision of State tax authorities and make tax returns to it and pay all taxes provided by the statute, whether they be held to be against the depositors or upon the bank's business.

We contend that such a contract is not only not incidental to its banking business, but is an interference with the bank as a Federal instrumentality, and therefore *ultra vires*.

State's counsel asks, Is it *ultra vires* for the bank to agree to do what the State might oblige it to do? (page 21).

But the State can't oblige it to pay a tax on its business or the taxes of its depositors, or to place itself under the supervision of the State tax authorities. Assuming that the State could tax the depositors as an independent class, the right to make the bank the *agent* to collect the tax is quite a different proposition from making it agree to pay their taxes.

Whatever the bank did to increase its business by advertising that it paid taxes on its deposits (see Defendant's Brief, p. 15), after it had been caught in the meshes of the statute, whatever it did to make the best of the situation *after the stipulation had been signed*, can have no possible bearing on the power of the bank to enter into the stipulation at the time. Benefits derived, if any, or loss suffered, if any, have no weight in determining the question of *power to make* the contract.

State's counsel argues as if the bank had come forward, after the State had passed a law to tax the depositors *only*,

and voluntarily proposed that it relinquish its rights (Brief, pp. 23, 24) to tax the depositors on the bank's agreement to pay the taxes or their equivalent, and that relying thereon and in good faith the State had lost its right to collect the tax against the depositors. But the State suggested this course on the part of the bank, more than that made it a part of the statute, and the Supreme Court of Vermont in its opinion concedes that "*It is easily conceivable that the provisions laying the tax on the depositors were framed and enacted in the full expectation that the payment of the tax would be otherwise provided for*" (Record, pp. 43, 44, fol. 87).

In view of this there is not much strength in the statement on page 24 of State's brief that on account of the stipulation the State formally relinquished its right to tax the depositors.

Nor is there much merit on their appeal to morals and justice to protect them. (See Brief, p. 24.)

Their reference on page 16 to the national banks entering into savings-bank business as *competitors of savings banks* is not fortunate, for it emphasizes what we have claimed that one purpose of the State in enacting the statute was to protect the business of State banks to the disadvantage of national banks or bring the latter under similar control.

Nor is reference to the act, on pages 16-17, as in a way beneficial to the bank, well founded or fortunate, for the reason why savings-bank depositors are exempt is because they have been made so by the State, as the bank is taxed on the deposits. The national-bank depositor, in being required before the act to list his deposits in national banks, stood the same as all other owners of choses in action, excepting where the State had taxed some other institution or corporation on the same property.

The statement on page 18 that, by reason of the law providing that a national bank might stipulate to pay the tax in consideration of the release by the State of its rights

against the depositors, this put "them in the same situation as depositors in savings banks," only emphasizes our claim that the State was seeking to bring national banks under its power of taxation the same as savings banks.

4. *Legal Obligation of the Stipulation.*

Counsel for the State are in error in contending that statements in the opinion of the Vermont court are findings of fact. The only facts found are those in the agreed statement of facts. (See contention, Brief, p. 25—(1).)

It is only the *opinion* of the Vermont court that "the case affords indications that the national banks are benefited by the act;" it is not a fact found.

If the Clement National Bank is benefited by the act would it be opposing it? That is an indication that one bank at least is not benefited.

Counsel for the State seems to think that they can eliminate from the case every consideration which in itself does not involve a Federal question, and that all matters of general law found by the State court are final. But we do not so understand the law. There are clearly Federal questions in this case, and they do not deny this; and that being so this court must consider the whole case, jurisdiction attaching by reason of the Federal questions involved. The matter of consideration and the matter of the validity of the provisions taxing the depositors are not determinative of the case, and the authorities cited do not sustain their contention (Brief, pp. 125-26).

In *Dower vs. Richards*, 151 U. S., 658, 666, the court said:

> "And if the decison of the State court rests *on an independent* ground of law, not involving a Federal question, this court has no jurisdiction."

The question is one of *jurisdiction* and the decision of the State court is final only where the case *rests* on an independent ground of law, not involving a Federal question.

In the case at bar it does not *rest* on an independent question of consideration or other general propositions of law; it *rests* upon a Federal question.

That the *opinion* of the State court is not considered as *finding any facts*, excepting as they sustain *facts* found by the trial court. See—

Egan *vs.* Hart, 165 U. S., 188.

The opinion of the State court is treated as a part of the record and may be examined to determine the questions presented, if necessary to throw light upon the findings, but not as making findings.

Egan *vs.* Hart, *supra.*

Referring to the case of Admas Express Co. *vs.* Kentucky, 166 U. S., cited page 28, we take no issue with the doctrine there laid down, but we contend that it supports our contention that it is a violation of the legislative intent to seek to make the word "tax" mean merely "something" (p. 27) and not what the statute says all the way through. For, by an examination of the whole act, as was done by the court in the above-named case, it will be plain that the legislature meant the term "*tax*" as used.

(5) *Interference with a Federal Agency* (pp. 34-52).

Quoting from the extract, page 35, from Mercantile Bank *vs.* Mayor, 121 U. S., 138, 154, the last sentence:

> "In fixing these limits (of State taxation permited by Congress) it became necessary *to prohibit the State from imposing such a burden as would prevent the capital of individuals from freely seeking investment in institutions which it was the express object of the law to establish and promote.*"

How long will individuals "freely seek investment" in capital stock of national banks, if their dividends are to be

diminished, perhaps to the point of disappearance, by the provisions of this act and future amendments increasing the rate? *This suggests at once a positive interference with a Federal agency.* State laws are not powerless to reach this class of deposits, as suggested by State's counsel (p. 36). The deposits were before the passage of the act subject to taxation like other choses in action.

They cannot successfully dispute our statement that "no such publicity is required of other taxpayers regarding their personal property; as suggested (p. 37). Their argument and the laws cited do not dispute our proposition that no other law requires taxpayers to give the *name of the bank* where their money is disposited.

The *Abilene Bank Case*, in 179 Fed. R., cited p. 40, and commented on as an authority for the State, expressly held that if construed to include national banks would exercise State visatorial power over national banks, which would not be tolerated. That is, it constituted an unlawful interference with a Federal agency. The court construed the law as though national banks were not included in the law, and so construing the statute held the act constitutional.

At page 43, counsel say the case is utterly void of anything to show any interference with the bank's obligation to the National Government.

We answer,

(1) If directly or indirectly a tax upon the bank, the act does so interfere most vitally, for it can destroy the savings bank business of the bank.

(2) The case shows a supervision and visatorial power exercised by the State over national banks.

(*a*) Requires them to make tax returns disclosing their business.

(*b*) Subjects them to the authority of the State Tax Commissioner as to what their returns shall be, the form and substance (Record, p. 16, fol. 33).

(3) It tends to interfere with the capital of individuals seeking investment in the stock of the bank, because of the likelihood of decreased dividends, by reason of the tax being paid out of the bank's funds properly belonging to the stockholders as dividends.

(See Bank *vs.* Mayor, 121 U. S., 138, 154.)

(4) The act seeks to control the conduct of the affairs of national banks in respect to savings deposits.

(See Davis *vs.* Elmira Savings Bank, 161 U. S., 275.)

In Owensboro National Bank *vs.* Owensboro, 173 U. S., 666, Brief, page 43, cited by the State, this court (Mr. Justice White) said they would go *back of the form to the substance*, and they there found that in *substance* the act taxed the franchise of a bank.

The court will examine the *substance* of the Vermont statute to determine whether it is a tax on the bank and so intended.

In one part of State's brief counsel argue that it is a tax on *the depositor only* (pp. 17, 77), and that if the bank had *kept its hands off*, the State would not be now in the position of being unable to enforce the tax against the depositors (p. 61); but in another part of their brief they say that the *coincidence* of rate on savings bank deposits and national bank deposits

> "indicates that the purpose and intent of the legislature was that intangible property similarly situated should ultimately bear approximately the same burden for the support of the Government" (p. 46). (See too p. 18.) That is to approximate the case to that of savings banks.

And in another place they say that by the act the State

> "held out the inducement of a low uniform rate, under which national bank depositors would be less inclined to conceal from the listers the fact that they

had such deposits; and to give the banks an opportunity to place themselves in as advantageous a situation as the State institutions, the option of paying on average deposits was accorded" (p. 77).

In another place they ask if the State is absolutely powerless to reach this class of property for taxation (p. 36).

And again they speak of the national banks entering into the savings department field as competitors with savings banks for the same class of business (p. 16). Did the State fear this competition and seek to minimize it?

The argument on pages 16 to 18 seems to be that the purpose was to put depositors in national banks in the same position approximately as depositors in savings banks, *who are exempt from taxation because the bank pays a franchise tax on the deposits.*

Don't they admit the purpose was to *approximately* tax the bank—that is, to tax it indirectly?

Don't they admit that the plan to tax the depositor went hand in hand with the plan to approximate the situation of deposits in national banks to those in savings banks? (p. 46).

Don't they admit that the purpose was to make deposits in national banks pay taxes as nearly like those in savings banks as could be effected? That is to get as near making the bank pay the tax as they could?

What then is left to their argument that they had in mind to tax the depositors only; and so far as the national banks were concerned had only in mind to benefit them by giving them an *option* (p. 77)?

What is left of their claim that the national bank interfered, *put their hands on them* and so induced them to give up their rights against the depositors? They admit the whole scheme!

They sought to create such a situation that banks could not do otherwise than "elect" to pay the taxes, and thereby

"approximate" themselves to the situation of savings banks by paying taxes to the State of Vermont on their business.

On page 48 they say that "The recoupment clause (sec. 814) is merely optional."

We say it is absolutely useless. For the bank to undertake to recoup would result in the depositors leaving, just as surely as if the bank failed to stipulate.

But the statute says it shall be *"lawful* for such bank to deduct such taxes so paid from the interest on depositors." (sec. 814).

Upon what legal ground can that right be sustained? Under what legal ground could the bank enforce it? It is unenforceable.

The result is the bank pays the tax and not the depositor and the bank cannot recoup. In other words the tax is on the bank for that reason.

If the bank is authorized by the statute to recover from the depositor what it pays to the State, viz: the taxes of the depositors, how can the stipulation be held to be a voluntary agreement to pay "something" to the State *in lieu* of the taxes?

This provision for recoupment seems to have been inserted in the act under the impression that the bank was acting as agent of the State to collect the depositor's tax. On no other ground could it recoup.

There is a concrete question before the court on this subject (p. 49). The fact that there is a recoupment provided which cannot be enforced makes the tax one on the bank in effect.

The attempt in this statute to bring national banks on a par with State banks is admitted by the State on page 50 brief, for counsel say the national bank could recoup itself by reducing its rate of interest and thus place itself on a par with State banks.

Was that what the State was seeking to compel the bank to do?

Duress (pp. 52-57).

There is nothing in the case to warrant the State in contending, as it does on p. 53 and in many other places in brief, that "the facts show that both the bank and the depositors had been *actually benefited*—the bank by an increase of business and the depositors by an increase in rate of interest."

If the case shows an increase in business or in rate of interest there is nothing to show this statute had anything to do with it. If there was an actual benefit to the bank it would be surprising that this bank should be contesting this suit.

But they say we have accepted the benefit of the act and we cannot now avoid the stipulation on the ground of duress.

But they assume something the case does not show. No benefit to the bank is shown coming to it under the stipulation, unless it is a *benefit* that thereby it was enabled to hold its depositors. But that only comes around again to our proposition that it was compelled to sign the stipulation to keep its depositors.

Counsel reiterate on page 56 what they have said often in the brief, a proposition on which much of their argument is based, that "it is found that the action of the bank in agreeing to pay was freely and understandingly taken." But that is not so found in the case, and the only place where it appears is where the Supreme Court says so in its opinion (Record, p. 44, fol. 89). But that is stated as *opinion* and is not a fact found. The Supreme Court could not *find* the fact, and it does not appear as a fact found in the agreed statement of facts.

They cannot dispose of the question of duress on the claim that is a non-Federal question. (See their brief and claim, p. 57.)

The case could not have been disposed of as against the bank by deciding the question of duress alone. It does not

rest on that, but on Federal questions that give the court jurisdiction. That leaves the question of duress open to this court for consideration with the Federal questions involved.

The case of Garr, Scott & Co. *vs.* Shannon, 223 U. S., 468, cited by State, supports our contention. A decision of the question of duress would not dispose of the case.

7. *Interference with existing contracts between depositors and bank* (pp. 57 to 61).

The State's counsel entirely misapprehended our contention as to the impairment of contract between bank and depositors.

We claim that these contracts are impaired because the act provides (section 814) that the bank may recoup from the interest due the depositor or from his deposit after the bank has paid the taxes of the depositor, and this would result in depriving the depositor of a part of the credit due him from the bank. He could sue the bank and recover back this deduction, on the ground that the provision of the law impaired his contract with the bank.

The contract of the bank is to pay the interest at the rate then in force, until changed by the directors; and as against the interference of third parties this contract protects the depositors in that rate (answer to argument, page 58).

8. *States right to compel bank to pay the depositor's tax in the first instance* (pp. 61-67).

This argument is beside the question.

It is based on the proposition that if the State could so compel the bank, then an agreement on the part of the bank so to do would be lawful (pp. 61-62).

But the only way the State could make the bank pay the depositor's tax would be as agent of the State to collect the tax *due* from the depositor.

While the agreement is either to (1) pay a tax itself to the State, or (2) to pay the depositor's taxes, or (3) to pay something in lieu of the tax to induce the State not to collect the tax from the depositors.

The thing the State might compel the bank to do, if it could so compel it, is quite a different thing from what the agreement provides for in any of the three possible constructions of its meaning.

In their argument on this point counsel for State seem to fall inadvertently into assuming what we claim, viz., that the State is seeking to collect out of the bank the depositor's tax, for they say if (*a*) the State can compel the bank to pay the tax against the depositor, it follows (*b*) that the bank can agree to do it.

But what the bank would do in the first case (*a*) would be to take the depositor's money or credit in its hands and turn it over to the State after the tax had accrued against the depositor, while in the second case (*b*) the bank would agree to pay the tax out of its own funds at a time when no tax had accrued against the depositor.

The reference on pp. 66-67 to the *Assaria State Bank case*, involving the validity of Kansas Depositors' Guaranty Fund Act, is of no force.

The Supreme Court had already held in deciding the validity of the Oklahoma law that contributions among *State banks* to the fund might be *compelled* by the State, and in the Kansas law held that if a State could compel contributions it could create motives for making them.

To make this reference applicable we would have to assume, not that the State could compel the bank as agent for the State to collect taxes accrued against depositors, but that the State could compel just what the stipulation provides, viz., to pay a tax on its average deposits, and to make tax returns to the State. But the State cannot compel national banks to pay taxes on its deposits or make tax returns.

On page 56 counsel say, "but if the State might compel the bank to pay the depositors' taxes, may not it bring about

a similar result or provide for an agreement to pay something it will accept in lieu of the taxes 'by the creation of motives less compulsory than demand.' "

But the State cannot compel the bank to pay its depositors' taxes, and only at the most to *collect* an accrued tax as the agent of the State.

In another light the quotation from State's brief seems to support our contention, viz:

That the State seems to think it can compel a national bank to pay its depositors' taxes, and has really attempted to exercise such compulsion by indirection.

Respectfully submitted,

MAXWELL EVARTS,
MARVELL C. WEBBER.
Counsel for Plaintiff in Error.